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First Session Thirty-sixth Parliament, 1997-98

Première session de la trente-sixième législature, 1997-1998

Government Publications

SENATE OF CANADA HOUSE OF COMMONS

SÉNAT DU CANADA CHAMBRE DES COMMUNES

Proceedings of the Special Joint Committee on

Délibérations du comité mixte spécial sur

Child Custody and Access

La garde et le droit de visite des enfants

Joint Chairmen: The Honourable LANDON PEARSON ROGER GALLAWAY, M.P. Coprésidents: L'honorable LANDON PEARSON ROGER GALLAWAY, député

Wednesday, September 30, 1998
Monday, October 5, 1998
Monday, October 19, 1998
Monday, October 26, 1998
Wednesday, October 28, 1998
Monday, November 2, 1998
Tuesday, November 3, 1998
Wednesday, November 4, 1998
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Le mercredi 30 septembre 1998
Le lundi 5 octobre 1998
Le lundi 19 octobre 1998
Le lundi 26 octobre 1998
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Le lundi 2 novembre 1998
Le mardi 3 novembre 1998
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Le mardi 17 novembre 1998
Le vendredi 20 novembre 1998
Le lundi 23 novembre 1998

Issue No. 36
Fortieth to fifty-third meetings on:
Child custody and access arrangements
after separation and divorce

Fascicule nº 36

Quarantième à la cinquante-troisième réunion sur:

La garde et le droit de visite des enfants
après la séparation ou le divorce des parents

APPEARING:

COMPARAÎT:

The Honourable Ethel Blondin-Andrew, Secretary of State (Children and Youth) L'honorable Ethel Blondin-Andrew, secrétaire d'État (Enfance et Jeunesse)

The Honourable Hedy Fry, Secretary of State (Multiculturalism) (Status of Women)

L'honorable Hedy Fry, secrétaire d'État (Multiculturalisme) (Situation de la femme)

WITNESSES: (See back cover)



TÉMOINS: (Voir à l'endos)

THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS

Joint Chairmen:

Senator Landon Pearson Roger Gallaway, M.P.

Representing the Senate:

The Honourable Senators:

Cohen DeWare
Cook Maloney
Cools

Representing the House of Commons:

Members:

Bakopanos Longfield
Bennett Lowther
Bertrand Mancini
Dalphond-Guiral Mayfield
Finestone Paradis
Forseth St-Hilaire
Harvard St-Jacques
Karetak-Lindell

(Quorum 12)

Changes in membership of the committee:

Pursuant to Rule 85 (4) of the Senate, membership of the committee was amended as follows:

The name of the Honourable Senator Losier-Cool substituted for that of the Honourable Senator Maloney (October 26, 1998).

The name of the Honourable Senator Maloney substituted for that of the Honourable Senator Losier-Cool (October 28, 1998).

The name of the Honourable Senator LeBreton removed (November 16, 1998).

The name of the Honourable Senator Losier-Cool substituted for that of the Honourable Senator Maloney (*November 19, 1998*).

The name of the Honourable Senator Maloney substituted for that of the Honourable Senator Losier-Cool (November 23, 1998).

House of Commons:

Pursuant to Standing Order 104(3) and the Report of the Standing Committee on Procedure and House Affairs adopted February 3, 1998:

Monique Guay replaced Madeleine Dalphond-Guiral.

Charles Hubbard replaced Nancy Karetak-Lindell.

Shaughnessy Cohen replaced Sheila Finestone.

Paul Szabo replaced Denis Paradis.

Charles Hubbard replaced Carolyn Bennett.

Larry McCormick replaced John Harvard.

Peter Stoffer replaced Peter Mancini.

John Finlay replaced Robert Bertrand.

LE COMITÉ MIXTE SPÉCIAL SUR LA GARDE ET LE DROIT DE VISITE DES ENFANTS

Coprésidents:

Le sénateur Landon Pearson Roger Gallaway, député

Représentant le Sénat:

Les honorables sénateurs:

Cohen DeWare
Cook Maloney
Cools

Représentant la Chambre des communes:

Députés:

Bakopanos Longfield
Bennett Lowther
Bertrand Mancini
Dalphond-Guiral Mayfield
Finestone Paradis
Forseth St-Hilaire
Harvard St-Jacques
Karetak-Lindell

(Ouorum 12)

Modifications de la composition du comité:

Conformément à l'article 85(4) du Règlement du Sénat, la liste des membres du comité est modifiée, ainsi qu'il suit:

Le nom de l'honorable sénateur Losier-Cool est substitué à celui de l'honorable sénateur Maloney (le 26 octobre 1998).

Le nom de l'honorable sénateur Maloney est substitué à celui de l'honorable sénateur Losier-Cool (le 28 octobre 1998).

Le nom de l'honorable sénateur LeBreton enlevé (le 16 novembre 1998).

Le nom de l'honorable sénateur Losier-Cool est substitué à celui de l'honorable sénateur Maloney (le 19 novembre 1998).

Le nom de l'honorable sénateur Maloney est substitué à celui de l'honorable sénateur Losier-Cool (le 23 novembre 1998).

Chambre des communes:

Conformément à l'article 104(3) et du Rapport du comité permanent de la procédure et des affaires de la Chambre adopté le 3 février 1998.

Monique Guay remplace Madeleine Dalphond-Guiral.

Charles Hubbard remplace Nancy Karetak-Lindell.

Shaughnessy Cohen remplace Sheila Finestone.

Paul Szabo remplace Denis Paradis.

Charles Hubbard remplace Carolyn Bennett.

Larry McCormick remplace John Harvard.

Peter Stoffer remplace Peter Mancini,

John Finlay remplace Robert Bertrand.

Walt Lastewka replaced John Harvard. Ian Murray replaced Nancy Karetak-Lindell. John Maloney replaced Sheila Finestone. Paddy Torsney replaced Sheila Finestone. Shaughnessy Cohen replaced Robert Bertrand. Deborah Grev replaced Paul Forseth. John Richardson replaced Nancy Karetak-Lindell. Shaughnessy Cohen replaced Sheila Finestone. Lynn Myers replaced John Harvard. John Finlay replaced Denis Paradis. Shaughnessy Cohen replaced Robert Bertrand. John Bryden replaced John Harvard. Joe Jordan replaced Robert Bertrand. John Cannis replaced Denis Paradis. Elinor Caplan replaced Eleni Bakopanos. Wayne Easter replaced Denis Paradis.

Walt Lastewka remplace John Harvard. Ian Murray remplace Nancy Karetak-Lindell. John Maloney remplace Sheila Finestone. Paddy Torsney remplace Sheila Finestone. Shaughnessy Cohen remplace Robert Bertrand. Deborah Grey remplace Paul Forseth. John Richardson remplace Nancy Karetak-Lindell. Shaughnessy Cohen remplace Sheila Finestone. Lynn Myers remplace John Harvard. John Finlay remplace Denis Paradis. Shaughnessy Cohen remplace Robert Bertrand. John Bryden remplace John Harvard. Joe Jordan remplace Robert Bertrand. John Cannis remplace Denis Paradis. Elinor Caplan remplace Eleni Bakopanos. Wayne Easter remplace Denis Paradis.

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MINUTES OF PROCEEDINGS

OTTAWA, Wednesday, September 30, 1998 (40)

[English]

The Special Joint Committee on Child Custody and Access met in camera at 3:40 p.m. this day, in Room 209, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (5).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Paul Forseth, Roger Gallaway, Judi Longfield, Eric Lowther, Peter Mancini and Philip Mayfield (8).

Acting members present: Monique Guay for Madeleine Dalphond-Guiral, Charles Hubbard for Nancy Karetak-Lindell, Shaunnessy Cohen for Sheila Finestone (3).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1998 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

It was agreed, — That the committee meet on Mondays at 3:30 p.m. for the purpose of considering a draft report.

At 4:40 p.m., the committee adjourned to the call of the Joint Chairmen.

ATTEST:

OTTAWA, Monday, October 5, 1998 (41)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:41 p.m. this day, in Room 269, West Block, the Joint Chairman, The Honourable Landon Pearson, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, Marjory LeBreton and Landon Pearson (4).

Representing the House of Commons: Eleni Bakopanos, Madeleine Dalphond-Guiral, Sheila Finestone, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini and Philip Mayfield (7).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator; Ron Stewart, Research Advisor.

PROCÈS-VERBAUX

OTTAWA, le mercredi 30 septembre 1998 (40)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 40, dans la salle 209 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (5)

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Paul Forseth, Roger Gallaway, Judi Longfield, Eric Lowther, Peter Mancini et Philip Mayfield (8).

Membres suppléants présents: Monique Guay pour Madeleine Dalphond-Guiral, Charles Hubbard pour Nancy Karetak-Lindell, Shaughnessy Cohen pour Sheila Finestone (3).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; et Ron Stewart, conseiller en recherche.

Conformément aux ordres de renvoi du Sénat du 28 octobre 1998 et de la Chambre des communes du 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Il est convenu, — Que le comité se réunisse les lundis à 15 h 30 afin d'examiner une ébauche de rapport.

À 16 h 40, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 5 octobre 1998 (41)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 41 dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson (coprésidente).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Marjory LeBreton et Landon Pearson (4).

Représentant la Chambre des communes: Eleni Bakopanos, Madeleine Dalphond-Guiral, Sheila Finestone, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini et Philip Mayfield (7).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Ron Stewart, conseiller en recherche

Pursuant to its Order of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The Honourable Senator Anne C. Cools raised a point of order regarding quorum.

The Joint Chair ruled that a sufficient number of members were present to hold the meeting.

At 6:05 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, October 19, 1998 (42)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:45 p.m., this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, and Marian Maloney and Landon Pearson (4).

Representing the House of Commons: Eleni Bakopanos, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, and Eric Lowther (8).

Acting members present: Paul Szabo for Denis Paradis, Charles Hubbard for Carolyn Bennett; Larry McCormick for John Harvard; Peter Stoffer for Peter Mancini (4).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The Joint Chairmen presented the Eighth Report of the Subcommittee on Agenda and Procedure as follows:

Your subcommittee met Tuesday, October 6, 1998 to consider the future business of the committee and agreed to make the following recommendations:

It was agreed, —That the Special Joint Committee on Child Custody and Access hold its future meetings as follows:

Monday, October 19, 1998 — 3:30 p.m. (no definite end time) IN CAMERA

Discussion of "core principles" and consideration of additions and revisions to the Draft Report — "List of Possible Recommendations" and "Summary of Evidence."

Conformément à son ordre de renvoi du Sénat du 28 octobre 1997 et à son ordre de la Chambre des communes du 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

L'honorable Anne C. Cools en appelle au Règlement en ce qui concerne le quorum.

La coprésidente déclare qu'il y a suffisamment de membres présents pour tenir une séance.

À 18 h 05, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 19 octobre 1998 (42)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 45, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Marian Maloney et Landon Pearson (4).

Représentant la Chambre des communes: Eleni Bakopanos, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, et Eric Lowther (8).

Membres suppléants présents: Paul Szabo pour Denis Paradis, Charles Hubbard pour Carolyn Bennett; Larry McCormick pour John Harvard; Peter Stoffer pour Peter Mancini (4).

Aussi présents: De la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 28 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude de la garde et le droit de visite des enfants.

Les coprésidents présentent le huitième rapport du sous-comité du programme et de la procédure comme suite:

Le sous-comité s'est réuni le mardi 6 octobre 1998 pour discuter des travaux futurs du comité et a convenu de formuler les recommandations suivantes:

Il est convenu, — Que le comité mixte spécial sur la garde et le droit de visite des enfants tienne ses prochaines réunions de la façon suivante:

Lundi 19 octobre 1998 — 15 h 30 (aucune heure précise de clôture) À HUIS CLOS

Discussion des «principes de fond» et examen des ajouts et des modifications à l'ébauche de rapport — «Liste des recommandations» et «Résumé des témoignages».

Monday, October 26, 1998 — 3:30 p.m. (no definite end time) IN CAMERA

Further consideration and approval of progress to date.

Monday, November 2, 1998 — 3:30 p.m. - 5:30 p.m.

Appearance of:

The Honourable Andy Scott, Solicitor General of Canada;

The Honourable Ethel Blondin-Andrew, Secretary of State (Children and Youth);

The Honourable Hedy Fry, Secretary of State (Multiculturalism) (Status of Women).

Tuesday, November 3, 1998 — 3:30 p.m. IN CAMERA

Approval of final recommendations and summary of evidence.

It was agreed, — That the committee engage the services of an English Reviser/Editor and a French Reviser/Editor to review and edit the final report of the committee.

Sheila Finestone moved, — That the Eighth Report of the Subcommittee on Agenda and Procedure be concurred in.

After debate, question being put on the motion, it was agreed to.

At 6:00 p.m. the sitting was suspended.

At 6:35 p.m. the sitting resumed.

At 7:26 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, October 26, 1998 (43)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:40 p.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Rose-Marie Losier-Cool, Anne C. Cools, Mabel M. DeWare and Landon Pearson (5).

Representing the House of Commons: Eleni Bakopanos, Madeleine Dalphond-Guiral, Paul Forseth, Roger Gallaway, Philip Mayfield and Peter Mancini (6).

Acting members present: John Finlay for Robert Bertrand, Walt Lastewka for John Harvard, Ian Murray for Nancy Karetak-Lindell and John Maloney for Sheila Finestone (4).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas and Margaret Young, Research Coordinators; Ron Stewart, Research Advisor.

Lundi 26 octobre 1998 — 15 h 30 (aucune heure précise de clôture) À HUIS CLOS

Examen qui se poursuit et approbation du travail fait jusqu'à maintenant.

Lundi 2 novembre 1998 - 15 h 30 - 17 h 30

Comparution de:

L'honorable Andy Scott, solliciteur général du Canada;

L'honorable Ethel Blondin-Andrew, secrétaire d'État (Enfance et Jeunesse):

L'honorable Hedy Fry, secrétaire d'État (Multiculturalisme) (Situation de la femme).

Mardi 3 novembre 1998 - 15 h 30 À HUIS CLOS

Approbation des dernières recommandations et résumé des témoignages.

Il est convenu, — Que le comité retienne les services d'un réviseur anglophone et d'un réviseur francophone pour examiner et réviser le rapport final du comité.

Sheila Finestone propose, — Que le huitième rapport du sous-comité du programme et de la procédure soit adopté.

Après débat, la motion, mise aux voix, est adoptée

À 18 heures, la séance est suspendue.

À 18 h 35, la séance reprend.

À 19 h 26, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 26 octobre 1998 (43)

(45)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit à huis clos aujourd'hui à 15 h 40, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Rose-Marie Losier-Cool, Anne C. Cools, Mabel M. DeWare et Landon Pearson (5).

Représentant la Chambre des communes: Eleni Bakopanos, Madeleine Dalphond-Guiral, Paul Forseth, Roger Gallaway, Philip Mayfield et Peter Mancini (6).

Membres suppléants présents: John Finlay pour Robert Bertrand, Walt Lastewka pour John Harvard, Ian Murray pour Nancy Karetak-Lindell et John Maloney pour Sheila Finestone (4).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas et Margaret Young, coordonnatrices de la recherche; Ron Stewart, conseiller en recherche.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

On the motion of Mr. Forseth, it was agreed, — That the committee do now adjourn.

At 5:24 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Wednesday, October 28, 1998 (44)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 7:12 p.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

Representing the House of Commons: Carolyn Bennett, Madeleine Dalphond-Guiral, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judy Longfield, Eric Lowther and Philip Mayfield (8).

Acting members present: Paddy Torsney for Sheila Finestone, Shaughnessy Cohen for Robert Bertrand (2).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas and Margaret Young, Research Coordinators; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The committee considered a draft report.

At 9:40 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, November 2, 1998 (45)

[English]

The Special Joint Committee on Child Custody and Access met in a televised session at 3:38 p.m. this day, in Room 253-D, Centre Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding. Conformément à son ordre de renvoi du Sénat du 28 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

Sur motion de M. Forseth, il est convenu, — Que le comité s'ajourne maintenant.

À 17 h 24, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le mercredi 28 octobre 1998 (44)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 19 h 12, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Ermine J. Cohen, Joan Cook, Anne C. Cools, Mabel DeWare, Marian Maloney et Landon Pearson (6).

Représentant la Chambre des communes: Carolyn Bennett, Madeleine Dalphond-Guiral, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther et Philip Mayfield (8).

Membres suppléants présents: Paddy Torsney pour Sheila Finestone, Shaughnessy Cohen pour Robert Bertrand (2).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas et Margaret Young, coordonnatrices de la recherche: Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

Le comité examine une ébauche de rapport.

À 21 h 40, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 2 novembre 1998 (45)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui dans une session télévisée, à 15 h 38, dans la salle 253-D de l'édifice du Centre, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson (coprésidents).

Members of the committee present:

Representing the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Eric Lowther, Peter Mancini, Philip Mayfield and Caroline St-Hilaire (9).

Acting member present: Deborah Grey for Paul Forseth (1).

Other Member of the House of Commons present: Shaughnessy Cohen (1).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator; Margaret Young and Ron Stewart, Research Advisors.

Appearing: The Honourable Ethel Blondin-Andrew, Secretary of State (Children and Youth);

The Honourable Hedy Fry, Secretary of State (Multiculturalism) (Status of Women).

WITNESSES:

Patricia Walsh, Program Consultant, Family Support, Health Canada:

Florence Ievers, Coordinator, Status of Women Canada;

Lorraine Pelot, Health Canada.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The Honourable Hedy Fry and the Honourable Ethel Blondin-Andrew made opening statements and answered questions.

At 5:38 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, November 2, 1998 (46)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 6:45 p.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (5).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Roger Gallaway, Judi Longfield, Eric Lowther, Peter Mancini and Philip Mayfield (8). Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (6).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Eric Lowther, Peter Mancini, Philip Mayfield et Caroline St-Hilaire (9).

Membre suppléant présent: Deborah Grey pour Paul Forseth (1).

Autre députée présente: Shaughnessy Cohen (1).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Margaret Young et Ron Stewart, conseiller en recherche.

Comparaissent: L'honorable Ethel Blondin-Andrew, secrétaire d'État (Enfance et jeunesse);

L'honorable Hedy Fry, secrétaire d'État (Multiculturalisme) (Situation de la femme).

TÉMOINS:

Patricia Walsh, consultante en programme, Aide à la famille, Santé Canada;

Florence Ievers, coordonnatrice, Situation de la femme Canada; Lorraine Pelot, Santé Canada.

Conformément aux ordres de renvoi reçus du Sénat du 28 octobre 1997 et de la Chambre des communes le 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

L'honorable Hedy Fry et l'honorable Ethel Blondin-Andrew font des déclarations et répondent aux questions.

À 17 h 38, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 2 novembre 1998 (46)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 18 h 45, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (5).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Roger Gallaway, Judi Longfield, Eric Lowther, Peter Mancini et Philip Mayfield (8). Acting member present: John Richardson for Nancy Karetak-Lindell (1).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The committee resumed consideration of its draft report.

At 8:55 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Tuesday, November 3, 1998 (47)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 4:00 p.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini and Diane St-Jacques (11).

Acting members present: Shaughnessy Cohen for Sheila Finestone, Lynn Myers for John Harvard, John Finlay for Denis Paradis, Shaughnessy Cohen for Robert Bertrand and John Bryden for John Harvard (5).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The committee continued its consideration of a draft report.

At 5:28 p.m., the sitting was suspended.

At 6:35 p.m., the sitting resumed.

At 9:05 p.m., the committee adjourned to the call of the Chair.

ATTEST:

Membre suppléant présent: John Richardson pour Nancy Karetak-Lindell (1).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young; Ron Stewart, conseiller en recherche.

Conformément aux ordres de renvoi reçus du Sénat du 28 octobre 1997 et de la Chambre des communes le 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend l'examen d'une ébauche de rapport.

À 20 h 55, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le mardi 3 novembre 1998

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos à, 16 heures dans la salle 269 de l'édifice de l'Ouest, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (6).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini et Diane St-Jacques (11).

Membres suppléants présents: Shaughnessy Cohen pour Sheila Finestone, Lynn Myers pour John Harvard, John Finlay pour Denis Paradis, Shaughnessy Cohen pour Robert Bertrand et John Bryden pour John Harvard (5).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche, et Margaret Young; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et de la Chambre des communes le 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

Le comité poursuit son examen d'une ébauche de rapport.

À 17 h 28, la séance est suspendue.

À 18 h 35, la séance reprend.

À 21 h 05, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, Wednesday, November 4, 1998 (48)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:48 p.m. this day, in Room 705, La Promenade Building, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (5).

Representing the House of Commons: Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther and Philip Mayfield (7).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to child custody and access.

The committee continued its consideration of a draft report.

At 5:00 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, November 16, 1998 (49)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 10:27 a.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools and Landon Pearson (4).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther and Philip Mayfield (9).

Acting members present: Joe Jordan for Robert Bertrand, John Cannis for Denis Paradis (2).

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Order of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to Child Custody and Access.

OTTAWA, le mercredi 4 novembre 1998 (48)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 48, dans la salle 705 de l'immeuble La Promenade, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (5).

Représentant la Chambre des communes: Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther et Philip Mayfield (7).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young; et Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et de la Chambre des communes le 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

Le comité poursuit son examen d'une ébauche de rapport.

À 17 heures, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 16 novembre 1998 (49)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 10 h 27, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools et Landon Pearson (4).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther et Philip Mayfield (9).

Membres suppléants présents: Joe Jordan pour Robert Bertrand, John Cannis pour Denis Paradis (2).

Aussi présents: De la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young; et Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Judi Longfield, moved, — That the Joint Chairmen report to their respective chambers the following:

That in accordance with its Order of Reference from the Senate of October 28, 1997 and from the House of Commons of November 18, 1997, your committee has considered matters relating to custody and access arrangements after separation and divorce and has agreed to the following:

That the Special Joint Committee on Child Custody and Access be authorized to continue its deliberations beyond November 30, 1998 and that it present its final report no later than December 11, 1998.

After debate, the motion was agreed to.

The committee resumed its consideration of a draft report.

At 11:55 a.m., the sitting was suspended.

At 12:25 p.m., the sitting resumed.

At 1:55 p.m., the sitting was suspended.

At 3:45 p.m., the sitting resumed.

At 6:00 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Tuesday, November 17, 1998 (50)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 10:23 a.m. this day, in Room 306, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Mabel M. DeWare, Marian Maloney and Landon Pearson (4).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther and Peter Mancini (9).

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Order of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to Child Custody and Access.

The committee resumed its consideration of a draft report.

At 11:50 a.m., the committee adjourned to the call of the Chair.

ATTEST:

Judi Longfield propose, — Que les coprésidents fassent rapport à leur Chambre respective de ce qui suit:

Que, conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le comité a examiné les questions concernant la garde et le droit de visite des enfants après une séparation et un divorce et a convenu de ce qui suit:

Que le comité mixte spécial sur la garde et le droit de visite des enfants soit autorisé à poursuivre ses délibérations au-delà du 30 novembre 1998 et qu'il présente son rapport final au plus tard le 11 décembre 1998.

Après débat, la motion est adoptée.

Le comité reprend l'examen de son ébauche de rapport.

À 11 h 55, la séance est suspendue.

À 12 h 25, la séance reprend.

À 13 h 55, la séance est suspendue.

À 15 h 45, la séance reprend.

À 18 heures, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le mardi 17 novembre 1998 (50)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 10 h 23, dans la salle 306 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Mabel M. DeWare, Marion Maloney et Landon Pearson (4).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther et Peter Mancini (9).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Margaret Young; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend l'examen d'une ébauche de rapport.

À 11 h 50, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, Tuesday, November 17, 1998 (51)

[English]

The Special Joint Committee on Child Custody and Access met in camera at 3:33 p.m. this day, in Room 306, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Scnators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell and Judi Longfield (7).

In attendance: From the Library of Parliament: Margaret Young; Ron Stewart, Research Advisor.

Pursuant to its Order of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study relating to Child Custody and Access.

The committee resumed its consideration of a draft report.

At 5:35 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Friday, November 20, 1998 (52)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 10:15 a.m. this day, in Room 308, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Joan Cook, Anne C. Cools, Mabel M. DeWare, Rose-Marie Losier-Cool and Landon Pearson (5).

Representing the House of Commons: Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield and Philip Mayfield (6).

Acting members present: Elinor Caplan for Eleni Bakopanos and Wayne Easter for Denis Paradis (2).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer; Ron Stewart, Research Advisor.

Pursuant ot its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study on Child Custody and Access.

The committee resumed consideration of its draft report.

OTTAWA, le mardi 17 novembre 1998 (51)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 33, dans la salle 306 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (6).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell et Judi Longfield (7).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Margaret Young; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend son examen d'une ébauche de rapport.

À 17 h 35, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le vendredi 20 novembre 1998 (52)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 10 h 15, dans la salle 308 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Joan Cook, Anne C. Cools, Mabel M. DeWare, Rose-Marie Losier-Cool et Landon Pearson (5).

Représentant la Chambre des communes: Carolyn Bennett, Sheila Finestone, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield et Philip Mayfield (6).

Membres suppléants présents: Elinor Caplan pour Eleni Bakopanos et Wayne Easter pour Denis Paradis (2).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 29 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend l'examen de son ébauche de rapport.

At 12:10 p.m., the sitting was suspended.

At 12:45 p.m., the sitting resumed.

On motion of Sheila Finestone, it was agreed, — That the committee engage the services of Kathryn Randle as an editor/revisor for the period of November 23 to December 4, 1998 and that the amount of the contract not exceed \$5,600.00.

It was moved by Judi Longfield, — That the committee engage the services of Angèline Fournier as an editor/revisor for the period of November 23 to December 4, 1998, and that the amount of the contract not exceed \$5,600.00.

After debate, the question being put on the motion, it was agreed to.

On the motion of Elinor Caplan, it was agreed, — That the committee authorize a contract extension for Ron Stewart, Research Advisor, for the period of November 30 to December 11, 1998, and that the amount of the extension not exceed \$5.500.00.

At 2:31 p.m., the committee adjourned to the call of the Chair.

ATTEST:

OTTAWA, Monday, November 23, 1998 (53)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:45 p.m. this day, in Room 269, West Block, the Joint Chairmen, the Honourable Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

Representing the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare and Landon Pearson (5).

Representing the House of Commons: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Philip Mayfield and Caroline St-Hilaire (10).

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator; Margaret Young, Research Officer; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study on Child Custody and Access.

The committee resumed consideration of its draft report.

At 6:10 p.m., the sitting was suspended.

À 12 h 10, la séance est suspendue.

À 12 h 45, la séance reprend.

Sur motion de Sheila Finestone, *il est convenu*, — Que le comité retienne les services de Kathryn Randle à titre de réviseure/éditeure pour la période allant du 23 novembre au 4 décembre 1998, pour un montant total n'excédant pas 5 600 \$.

Judi Longfield propose, — Que le comité retienne les services d'Angèline Fournier à titre de réviseur/éditeure pour la période allant du 23 novembre au 4 décembre 1998, pour un montant total n'excédant pas 5 600 \$.

Après débat, la motion, mise aux voix, est adoptée.

Sur motion de Elinor Caplan, *il est convenu*, — Que le comité autorise le prolongement du contrat de Ron Stewart, conseiller en recherche, pour la période allant du 30 novembre au 11 décembre 1998, et que le montant total pour cette période n'excède pas 5 500 \$.

À 14 h 31, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, le lundi 23 novembre 1998 (53)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 45 dans la salle 269 de l'édifice de l'Ouest, sous la présidence de l'honorable Landon Pearson et de Roger Gallaway (coprésidents).

Membres du comité présents:

Représentant le Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare et Landon Pearson (5).

Représentant la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Philip Mayfield et Caroline St-Hilaire (10).

Aussi présents: Du Service de recherche de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche; Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 29 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend l'examen de son ébauche du rapport.

À 18 h 10, la séance est suspendue.

At 7:23 p.m., the sitting resumed.

At 8:30 p.m., the committee adjourned to the call of the Chair.

ATTEST:

À 19 h 23, la séance reprend.

 \grave{A} 20 h 30, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

Les cogreffiers du comité,

Catherine Piccinin Richard Rumas

Joint Clerks of the Committee

EVIDENCE

OTTAWA, Monday, November 2, 1998

[English]

The Joint Chairman (Mr. Roger Gallaway (Sarnia—Lambton, Lib.)): I call this meeting to order. This is meeting 45 of the Special Joint Committee on Child Custody and Access.

With us today are two witnesses, the first being the Honourable Ethel Blondin-Andrew, Secretary of State for Children and Youth, and the second being the Honourable Hedy Fry, Secretary of State for Multiculturalism and the Status of Women.

We're going to ask Secretary of State Fry to start, and ask that she introduce the officials who are with her from the department.

The Honourable Hedy Fry, Secretary of State, Multiculturalism and Status of Women: Thank you very much, Mr. Chairman.

I want to thank the committee for giving us the opportunity to present on this very important topic.

I would like to introduce Florence Ievers, the coordinator for Status of Women Canada, and Lorraine Pelot, who's now with Health Canada, but she has been in charge of this file and has only recently left us to go to Health Canada.

The Joint Chairman (Mr. Gallaway): Thank you. Please proceed.

Ms Fry: Thank you very much.

[Translation]

Before getting into my presentation, I would like to say that I've followed the committee hearings since the beginning, in February. The basic premise, yours, that of the committee members and of Parliament, as is indicated by the committee's mandate, is the interests of children.

How can we ensure, as far as possible, that divorce does not have a negative impact on the well-being of children? Although a good part of the discussions have been on that goal, many of the hearings have in fact revolved around statistics on men versus women. fathers versus mothers.

[English]

In our discussions, we want to be very careful not to exacerbate conflicts that already exist and to start pitting groups against each other. Without dealing with too many statistics, we know that anywhere between about 5 per cent and 7 per cent of cases reach court and involve high conflict. At least that's what the statistics we've heard repeatedly throughout these hearings have told us.

What we would like to put forward, as Status of Women Canada, is that before we mandate solutions that seem to be simplistic or that seem to be generic, we must be aware that in fact most cases must be taken in the context of the family life during the life of the family; the things that led to the conflict; and

TÉMOIGNAGES

OTTAWA, le lundi 2 novembre 1998

[Traduction]

Le coprésident (M. Roger Gallaway (Sarnia—Lambton, Lib.)): Je déclare la séance ouverte. Cette réunion est la réunion numéro 45 du comité mixte spécial sur la garde et le droit de visite des enfants.

Nous accueillons deux témoins aujourd'hui, l'honorable Ethel Blondin-Andrew, secrétaire d'État à l'Enfance et à la Jeunesse, et l'honorable Hedy Fry, secrétaire d'État au Multiculturalisme et à la Situation de la femme.

Nous allons demander à la secrétaire d'État Hedy Fry de commencer et la prier de nous présenter les fonctionnaires de son ministère qui l'accompagnent.

L'honorable Hedy Fry, secrétaire d'État, Multiculturalisme et Situation de la femme: Merci beaucoup, monsieur le président.

J'aimerais remercier le comité de nous avoir donné cette occasion de vous rencontrer pour discuter d'un sujet des plus importants.

Permettez-moi de vous présenter Florence Ievers, la coordonnatrice du Bureau de la situation de la femme, et Lorraine Pelot, qui travaille désormais à Santé Canada, mais qui était responsable de ce dossier jusqu'à son très récent départ.

Le coprésident (M. Gallaway): Merci. Veuillez commencer, je vous prie.

Mme Fry: Merci beaucoup.

[Français]

Avant d'entreprendre ma présentation, je tiens à dire que j'ai suivi les audiences du comité depuis le début, en février. La prémisse de départ, la vôtre, celle des membres du comité et du Parlement, comme l'indique le mandat du comité, est l'intérêt des enfants

Comment s'assurer, dans la mesure du possible, que le divorce n'a pas une incidence négative sur le bien-être des enfants? Bien qu'une bonne partie des discussions ait porté sur cet objectif, bon nombre des audiences ont, dans les faits, tourné autour des statistiques hommes contre femmes, pères contre mères.

[Traduction]

Dans nos discussions, nous devons veiller à éviter d'exacerber des conflits qui existent déjà et d'opposer les groupes les uns aux autres. Je ne veux pas citer trop de chiffres, mais nous savons qu'entre 5 et 7 p. 100 des cas vont jusque devant les tribunaux et donnent lieu à des litiges sérieux. C'est du moins ce qui ressort des statistiques que l'on n'a cessé de nous présenter au cours des audiences

Nous aimerions dire, au nom du bureau de la Situation de la femme, qu'avant d'imposer des solutions qui semblent trop simplistes ou générales, il faut se rappeler que la plupart de ces cas doivent être examinés dans le contexte de la vie familiale avant la séparation; des facteurs à l'origine du conflit; et des

the conflict that exists. Therefore, they must be flexible. Arrangements must be individual and must be tailored to meet the needs of specific families and must also reflect the reality that exists in those families.

If we do that, then we will be able to deal with the issues as they truly affect the reality of the lives of the groups.

I don't have to tell you — you've heard this, and have been listening to this for so many months now — that the context of divorce is one that is inherently detrimental to the children. Very few custody and access disputes reach the court, but those that do are the ones we hear about. Many of those that don't still have within them some elements of conflict, some elements of anger, some elements of dispute in which the children feel themselves batted back and forth.

We also know that in divorce, the family changes. No longer does the child live with two parents in a home. Suddenly, the parents are living separately, and that child is then quite often seen as a pawn that is to be moved from A to B to C to D. Quite often that leaves the child confused. The child loves both parents dearly, and the confusion between loving parents, being afraid of them, not wanting to pit parents against each other — because quite often the child feels that the child is the problem — the child in custody and access disputes sees herself or himself as the reason the parents are fighting, so that child automatically doesn't feel happy in either situation. We're dealing with a situation, then, in which everything is inherently geared to conflict and confusion.

We also know that divorce can exacerbate power imbalances and can increase the level of conflict that may or may not have existed during the life of that family.

I want to look at the tasks at hand from our perspective. We see two tasks. One deals specifically with the issues of violence, of conflict and power imbalances, and custody in a manner that promotes the well-being of the child. I think that is the first one we want to look at. The second task at hand deals with the issue of the well-being of the child. How do we look at how the child's best interests are served in this whole thing?

I know you know that those are your tasks, and I know you have been dealing with those tasks in that way.

How do we identify factors that are necessary to the well-being of children in divorcing families? We think those factors are fairly clear. One, how do we ensure that the safety and security of the child is met? How do we ensure that continuity and stability of the family is there for that child? How do we ensure that care is foremost in the minds of those who are delivering care to that child? And how do we ensure that there is an environment in which there is minimal parental conflict?

Let us first, then, deal with the first task at hand, which is to look at the issues of violence and abuse and power imbalances. Violence and abuse exist in very many forms. They can be psychological or emotional, they can be physical or sexual, and

antagonismes qui existent. Il importe donc que ces solutions soient souples. Les arrangements doivent être conclus individuellement et en fonction des besoins particuliers de chaque famille et refléter la réalité de ces familles.

Si nous faisons tout cela, nous réussirons à trouver des solutions aux problèmes tels qu'ils se posent dans la vie réelle des groupes concernés.

Je n'ai pas besoin de vous le dire — ça fait des mois que vous entendez cela — que le contexte d'un divorce est un contexte qui est intrinsèquement préjudiciable pour les enfants. Très peu de litiges portant sur la garde d'enfants sont portés devant les tribunaux, mais c'est de ces cas-là que nous entendons parler. Dans bon nombre des cas qui sont réglés hors cour, il subsiste des éléments de conflit, des éléments de colère, des éléments de dispute où les enfants ont le sentiment d'être tiraillés d'un côté à l'autre.

Nous savons également que lors d'un divorce, la famille change. L'enfant ne vit plus sous le même toit que ses deux parents. Tout d'un coup les parents vivent séparément, et l'enfant est souvent considéré comme un pion qu'il faut déplacer de A à B, à C, à D. Souvent l'enfant se trouve désorienté. Il aime beaucoup ses deux parents, et du fait de cette confusion entre les deux parents qui l'aiment, la peur de ses parents et le désir de ne pas les dresser l'un contre l'autre — car souvent l'enfant a l'impression que c'est lui, le problème — l'enfant qui fait l'objet de la bataille pour les droits de garde et de visite pense que c'est à cause de lui que les parents se disputent, de sorte qu'il ne se sent heureux dans aucune des situations. Nous avons alors affaire à une situation où tout est automatiquement source de conflit et de confusion.

Nous savons en outre qu'un divorce peut exacerber un déséquilibre du pouvoir et intensifier des antagonismes qui existaient peut-être déjà dans la famille avant la séparation.

J'aimerais examiner les tâches à accomplir, dans notre perspective. Nous en voyons deux. La première a trait spécifiquement aux problèmes posés par la violence, le conflit et la répartition inégale du pouvoir, et à la garde. Nous devons y pourvoir en favorisant le bien-être de l'enfant. Je pense que ces questions constituent notre première tâche. La deuxième concerne le bien-être de l'enfant. Comment pouvons-nous nous assurer que l'intérêt de l'enfant est défendu dans toute cette affaire?

Je sais que vous savez que c'est ce que vous avez à faire, et je sais que vous avez abordé les choses de cette manière.

Comment identifier les facteurs qui sont nécessaires au bienêtre des enfants dans les familles qui divorcent? Nous estimons que ces facteurs sont assez évidents. D'abord, comment garantir que l'enfant est en sécurité? Comment garantir la continuité et la stabilité de la famille pour cet enfant? Comment nous assurer que ceux ou celles qui s'occupent de l'enfant ont vraiment son bienêtre à coeur? Et comment nous assurer qu'il se trouvera dans un milieu où les disputes entre les parents seront réduites au minimum?

Penchons-nous d'abord sur la première tâche, et voyons les problèmes liés à la violence, aux agressions et au déséquilibre du pouvoir. La violence et les agressions peuvent revêtir de nombreuses formes. Elles peuvent être psychologiques ou they can be verbal. I think one of the things we do know is that children are always there watching. We know that in four out of ten families, children witness violence within the family.

How does that impact on the child? Here you have a child loving both parents, and yet feeling the need to protect one parent against the other, feeling fear of the abuser parent, and feeling a sense to protect the abused parent. Yet confusion exists in the child, who feels loyal to both parents. So the child immediately is a pawn, whether the child likes it or not, in situations of conflict.

What I would like to talk about is that the child is never safe or secure where there is an issue of real violence or abuse, either to the child or to another parent. There is also no doubt, as you have heard before, that violence against men exists, but there is overwhelming evidence that the majority of spousal violence is against women.

We have in fact followed the numerous recent media accounts of women being murdered by their spouses, but violence is evidenced in our newspapers and in our courts every day. Some 21,900 cases of spousal assault were recorded in 1996, to 154 police departments in Canada. The proportion of male victims was 11 per cent compared with female victims, at 89 per cent.

Separation inherently is a time in which that violence is exacerbated. In the 1993 violence against women survey, we found that one-fifth of women who experience violence by a former spouse said that the first time it occurred was during or following separation.

I am not blaming here; I am just trying to paint an environment for the child.

We know violence can be psychological and emotional. As a physician, I can tell you that the ones you don't see, the broken bones you don't find, the scars that don't heal, are the ones in which there is emotional or verbal abuse.

Again, as I said, it is a means of intimidation. The child is intimidated. Obviously, if the child is the direct receiver of the abuse, it's pretty clear that the child must be taken out of the abusive situation, but when one parent is the receiver of the abuse by another, the child is immediately caught in between.

Either the child learns that this is the way to resolve conflict and becomes, as we know happens in many cases, an abuser himself or herself, or the child is torn between loving, caring, wanting to defend and wanting to be loyal to both parents, and not knowing how to choose.

Family violence, as we well know, is an exercise of control and power over one person onto another. It is in fact for that reason that we feel violence must be taken into consideration, and the existing conflicts within the family, the existing situation in the family, before separation and divorce, must always be taken into consideration prior to making decisions.

morales, physiques ou sexuelles, ou encore verbales. Ce que nous savons, c'est que les enfants sont toujours là, à regarder. Nous savons que dans quatre familles sur dix, les enfants sont témoins de violence dans leur famille.

Quels effets cela a-t-il sur l'enfant? On a affaire à un enfant qui aime ses deux parents, mais qui néanmoins se sent obligé de protéger l'un des parents contre l'autre, qui a peur du parent qui maltraite l'autre et qui a envie de protéger celui qui est agressé. Alors l'enfant, qui veut rester fidèle à ses deux parents, ne sait plus où il en est. Dans ces situations de conflits, l'enfant devient un pion, qu'il le veuille ou non.

Ce dont je voudrais parler, c'est du fait que l'enfant n'est jamais en sécurité lorsqu'il y a une violence ou des agressions réelles, que ce soit envers l'enfant ou envers le parent. Il ne fait aucun doute non plus que la violence envers les hommes existe, mais qu'il est tout à fait clair que dans la majorité des cas, cette violence est dirigée contre les femmes.

Nous avons suivi les nombreux articles parus dans la presse récemment, sur des cas de femmes assassinées par leur conjoint, mais il est question de violence dans nos journaux et nos tribunaux tous les jours. Quelque 21 900 cas de voie de fait à l'égard d'un conjoint ont été enregistrés en 1996, par 154 postes de police au Canada. Dans 11 p. 100 des cas les victimes étaient des hommes, par rapport à 89 p. 100 de femmes.

Au moment de la séparation, cette violence est généralement exacerbée. Dans un sondage sur la violence à l'égard des femmes réalisé en 1993, un cinquième des femmes qui avaient été victimes de violence nous ont affirmé que la première fois avait eu lieu durant ou après la séparation.

Je n'accuse personne; j'essaie simplement de décrire le contexte de ce que vit l'enfant.

Nous savons que la violence peut être psychologique et morale. En tant que médecin, je peux vous dire que les sévices qui ne laissent pas de traces, les os cassés que l'on ne trouve pas, les cicatrices qui ne guérissent pas, sont le résultat d'agressions morales ou verbales.

Encore une fois, comme je l'ai dit, c'est un moyen d'intimidation. L'enfant est intimidé. Évidemment, si l'enfant est agressé directement, il ne fait nul doute qu'il faut le soustraire à cette situation, mais lorsque c'est un des parents qui est agressé par l'autre parent, l'enfant se trouve pris entre les deux.

Soit l'enfant apprend que c'est ainsi qu'il faut régler les conflits et, comme cela se voit souvent, devient lui-même ou elle-même agressif, soit il est déchiré entre son envie d'aimer, de défendre et de rester fidèle aux deux parents, et son incapacité de choisir.

Nous savons très bien que la violence familiale est l'exercice du pouvoir et le contrôle d'un membre de la famille sur un autre. C'est pour cela que nous estimons qu'il faut toujours savoir si l'on a affaire à un cas de violence, et tenir compte des antagonismes qui existaient dans la famille, de sa situation avant la séparation et le divorce, avant de prendre des décisions.

We know that the abused parent quite often makes a decision with regard to custody and access out of fear, and we know that many abused parents may make decisions to protect the children. For example, they may trade off fair child support settlements to avoid a custody battle.

How do we, therefore, use some guiding principles in looking at determining custody and access of a violent parent?

The presence of violence should override concern about the effects on children of not having contact with both parents. If there is fear for the child's safety, the concern of which one of the parents has right of access is not the issue here; the safety of the child is first and foremost.

I know there have been discussions about whether or not there are false allegations of abuse. As a physician, I can tell you that one of the first things you do is not take chances. You suggest that the child is taken away from what may be a potentially abusive situation until that abuse is proven, because after it's been proven that the abuse situation is real, it may be too late; the child has been in it all along. If it's proven to be negative, well, nothing was lost, and the child can return to that parent.

I think it's very important, therefore, that any allegation of abuse is dealt with quickly and is investigated as soon as possible. We feel that the best people to do that are the courts, the legal system, because there is definitely a process by which this should be done.

Now, we know that abusers use custody and access themselves, as well as threats of custody disputes, to control the abused spouse. In terms of assessing protective action and behaviour of a parent who is a victim, abusers should not be able to take advantage, or disadvantage, by using homelessness, depression, unemployment, in terms of leaving the child behind on the part of the parent who is the victim in the relationship.

Professionals in the justice system, such as judges and assessors, need social context training to understand violence and its effects. In fact, violence should be defined in family law legislation.

Some forms are more evident and more commonly acknowledged than others. Physical violence and sexual violence leaves a trail. You can see it, you can examine it, and you can find traces of it. But there are other forms of violence, emotional and verbal, that we know do not leave those kinds of scars.

Courts and judges can then make determinations regarding evidence and proof, and individual instances of false allegations should be left to the justice system.

I know there has been discussion of whether or not, if there is a false allegation, parents making the false allegations should be put into jail. I suppose if we look at all of this from the context of what is in the best interests of the child, the question is, how does

Nous savons que le parent agressé prend souvent des décisions relatives aux droits de garde ou de visite des enfants qui sont dictées par la peur, et nous savons qu'il arrive souvent que des parents victimes d'agression prennent des décisions pour protéger l'enfant. Il arrive qu'ils renoncent à obtenir une pension alimentaire juste pour le bien de l'enfant, afin d'éviter d'avoir à se battre pour la garde de l'enfant.

Quels principes directeurs pouvons-nous utiliser pour déterminer les droits de garde et de visite lorsqu'un parent a un comportement violent?

Le comportement violent d'un parent est un facteur qui devrait passer avant les conséquences que le fait de ne plus voir ses deux parents pourraient avoir pour l'enfant. Si l'on craint pour la sécurité de l'enfant, le souci de savoir lequel des deux parents a droit de visite n'est plus la question; la sécurité de l'enfant est tout ce qui compte.

Je sais que l'on a discuté pour savoir si l'on a parfois affaire à de fausses accusations d'agression. En tant que médecin, je peux vous dire que ce qu'il ne faut surtout pas faire, c'est prendre des risques. Il faut recommander de mettre l'enfant à l'abri de ce qui est peut-être une situation dangereuse, jusqu'à ce que l'on puisse prouver qu'il y a vraiment maltraitance, car si l'on attend d'avoir prouvé que le danger est réel, il peut être trop tard; l'enfant l'aura déjà subie. Si l'on prouve que le parent n'est pas violent, on n'a rien perdu, et l'enfant peut retourner chez ce parent.

Je crois donc qu'il est important de s'occuper rapidement de toute allégation d'agression et de faire enquête le plus vite possible. Nous estimons que les mieux placés pour le faire sont les tribunaux, le système judiciaire, car il faut absolument suivre une démarche précise pour ce genre d'enquête.

Mais nous savons que les agresseurs invoquent les droits de garde et de visite eux-mêmes et menacent de se battre pour l'obtention de la garde des enfants pour contrôler le conjoint agressé. Or il ne faudrait pas permettre au parent violent de profiter de la situation en menaçant l'autre de se retrouver à la rue, déprimé, sans emploi, pour le convaincre de laisser l'enfant.

Les professionnels du système judiciaire, notamment les juges et les évaluateurs, ont besoin d'une formation à caractère sociologique pour comprendre la violence et ses effets. En fait, la législation sur le droit de la famille devrait définir la violence.

Certaines formes de violence sont plus évidentes et plus généralement reconnues que d'autres. La violence physique ou sexuelle laisse des traces. Vous pouvez la voir, vous pouvez l'examiner et vous pouvez en voir les marques. Mais il existe une autre sorte de violence, morale et verbale, qui ne laisse pas ce genre de cicatrices.

Les tribunaux et les juges peuvent déterminer les preuves à fournir, et les cas particuliers de fausses allégations devraient être laissés à l'appareil judiciaire.

Je sais que l'on s'est demandé s'il faudrait ou non, en cas de fausse allégation, mettre en prison le parent qui fait cette fausse accusation. Je suppose que si l'on examine la situation en pensant au bien de l'enfant, on peut se demander comment il pourrait être

it serve the best interests of the child to put a parent into jail? I think that's the first thing you have to think about when you think of children.

In divorce, as I said, both parents no longer live in the home, and the child has to be shunted between parents. Now, good contact with both parents, if they are non-abusive, is excellent for the child. It's very important for the child's well-being. But it's also important for the child to have a clear sense of a home base.

There must be a place where that child can feel there is a home, where that child has roots, where that child can have a sense of the stability the child needs to be able to grow and to be able to exist.

From a recent study on children in Canada, we found that children who move more than three or four times during their lifespan as a child are more prone to, and liable to, have behavioural problems, mainly because of the fact that they don't have any roots. They don't have any special place in which to be.

So when you talk about custody and access, I think it's very important to recognize that within custody and access, there is a place for that child to have a stable base that child can call home, even though the child should have liberal access to the non-custodial parent, whoever that is, and in cases where parents get along very well, then obviously joint custody works out quite well for both parents.

Joint custody, we believe, should not be legally imposed, and should not be forced on parents. It should be done by choice. Joint custody does not work where there is conflict between the parents. Again, as we've seen in the recent study on children in Canada, where there is parental conflict, the child has a greater incidence of behavioural problems.

It is not the moving from parent to parent to visit parents that creates the problem. It is when the parents, when the child visits, have conflicts against each other and are using one parent to say things about a parent, and the child goes back to the other home feeling they've been disloyal to the first parent. This creates in the child a sense of confusion, a sense of mixed loyalties, and therefore, in some of these instances, one has to consider whether both parents are necessarily always in the best interests of the child.

The financial needs of children should not be tied to their need for care. Meeting the financial needs of children should be legally imposed, as it is now, regardless of which parent has custody and authority to make decisions. Otherwise, child support can be used to lever or to force other decisions that may not promote the well-being of the children.

Satisfying the financial needs of children furthers their physical, mental and educational needs, so that they can have the tools and skills they need to go forward into the world. It is part of that continuing care stability of the child.

dans l'intérêt de l'enfant de mettre un parent en prison? Je crois que c'est la première question à se poser lorsqu'on pense aux enfants.

Comme je l'ai dit, lorsqu'un couple divorce, les deux parents cessent de vivre sous le même toit, et l'enfant doit faire la navette entre les deux. S'il peut garder un bon contact avec les deux, lorsque aucun d'entre eux n'est violent, c'est excellent pour l'enfant. Cela est très important pour le bien-être de l'enfant. Mais il est également très important pour l'enfant d'avoir un lieu où il se sent vraiment chez lui.

Il doit y avoir un endroit où l'enfant peut sentir qu'il est chez lui, où il a ses racines, où il a la stabilité dont il a besoin pour pouvoir grandir et exister.

Une récente étude canadienne sur les enfants a révélé que les enfants qui déménagent plus de trois ou quatre fois dans leur jeunesse sont davantage susceptibles d'avoir des problèmes de comportement, principalement parce qu'ils n'ont pas de racines. Ils n'ont pas d'endroit spécial où aller.

Aussi, quand vous parlez de droits de garde et de visite, est- il très important, à mon avis, de tenir compte du fait qu'il doit y avoir un endroit stable où l'enfant peut se considérer chez lui, même si l'enfant devrait pouvoir voir le parent qui n'a pas eu sa garde le plus possible. Dans les cas où les deux parents s'entendent bien, la garde partagée est bien sûr une bonne solution pour les deux parents.

La garde partagée ne devrait pas être imposée légalement; il ne faudrait pas forcer les parents à adopter cette solution. Elle devrait être choisie librement. La garde conjointe ne marche pas lorsque les parents sont en conflit. Cette récente étude canadienne sur les enfants a fait ressortir également que lorsque les parents sont en conflit, l'incidence des problèmes de comportement chez les enfants augmente.

Ce n'est pas le fait de passer d'un parent à l'autre, pour rendre visite à l'autre parent qui pose un problème. Le problème se pose lorsque les parents se disputent et que l'un des parents profite de la visite de l'enfant pour faire dire des choses à propos de l'autre parent, et que l'enfant repart en ayant l'impression d'avoir trahi son premier parent. Cela donne à l'enfant l'impression d'être confus, de ne plus savoir à qui se fier, et il faut donc se demander, dans certains cas, si le fait d'avoir ses deux parents est nécessairement toujours dans l'intérêt de l'enfant.

Les besoins financiers de l'enfant devraient être déterminés indépendamment du droit de garde. L'obligation de répondre aux besoins financiers de l'enfant devrait être imposée légalement, comme cela se fait actuellement, quel que soit le parent qui a la garde et l'autorité de prendre les décisions. Car sinon on pourrait se servir de la pension alimentaire pour imposer d'autres décisions qui pourraient ne pas favoriser le bien-être de l'enfant.

En répondant aux besoins financiers de l'enfant, on répond à ses besoins sur les plans financier, mental et éducatif, et on lui donne ainsi les outils nécessaires pour réussir dans le monde. C'est un des aspects de la stabilité dont l'enfant a besoin.

Because we recognize that within most divorce there is inherently a power imbalance, the cost of a dispute should not be limited by one parent's inability to participate in the system. I think there should be consideration given to legal aid or funded services to ensure that both parents have a voice in the system, especially where divorce has created an even greater power and economic imbalance, and one parent may not have access at all to any kind of legal aid to bring their cases forward.

Mediation should be one tool, we think, but not the only tool. There are many other tools that can be used for decreasing conflicts in situations. Forced mediation can lead to intimidation in many instances, especially where there is a power imbalance. If parents believe they cannot discuss the best interests of the child without being forced to have mediation, then, in fact, parents may be afraid to talk about the conflict, or to discuss issues that are of concern to them and to the child's well-being because they don't want to be forced into mediation where decisions would be made that may or may not be in the best interests of the child.

The task finally at hand is, how do we talk about the well-being of the child? We know children are accustomed to the patterns of care received in an intact family. Children who are loved and cared for, safe and secure, will be strong enough to weather the instability that comes in divorce. We know that.

We have seen, in fact — again, in this very recent study of children within Canada — that it is not whether a child lives with two parents or one parent. We know that 75 per cent of Canadian children today live with their biological parents, and yet we find that only one-third of parents in Canada give children the necessary environment for their well-being.

Therefore, what we're trying to say is that it's not whether a child is with two parents or one parent. It is whether the child has stability, whether there is consistency of rules and regulations and values by which that child must live. Sometimes, when we talk about conflicts between parents, remember that the parents play each other out. One wants to be the good person and make the other one the bad person, and one parent will always try to do what the other parent says the kid shouldn't do so that the parent can curry favour with the child.

That is one of the things that leads to behavioural problems in children, not the moving from parent to parent, but the playing off of who is the better parent. I think what we want to say is that those things should be taken into consideration when you talk about custody.

There are many custodial parents who wish that the noncustodial parent would take on more responsibility for the children. In many cases of custody and access, the issue is not whether or not the non-custodial parent gets to see the child, it's whether or not the child gets to see the non-custodial parent.

I think these types of arrangements, where parents can share the chores of caregiving for the child — going to the doctor, going to dental appointments, etc. — between the custodial and non-

Puisque nous reconnaissons que dans la plupart des cas de divorce il y a un déséquilibre du pouvoir, le règlement d'un différend ne devrait pas être influencé par l'incapacité d'un parent à participer au système. J'estime qu'il faudrait envisager de donner une aide juridique ou des services financés pour garantir que les deux parents pourront se faire entendre, surtout lorsque le divorce créé un déséquilibre encore plus grand du pouvoir et des moyens financiers des parents, et que l'un d'eux n'a peut-être pas du tout accès à une aide juridique pour faire valoir son cas.

La médiation devrait être un moyen, à notre avis, mais pas le seul. Il existe de nombreux moyens pour désamorcer les situations conflictuelles. La médiation forcée peut souvent donner lieu à une intimidation, surtout lorsqu'il y a un déséquilibre du pouvoir. Si les parents estiment ne pas pouvoir parler du bien de l'enfant sans être forcé à recourir à la médiation, il se peut qu'ils aient peur de parler de leur conflit, ou de discuter de questions qui les touchent ou touchent au bien-être de leur enfant, car ils ne veulent pas être forcés à se soumettre à une séance de médiation où l'on prendrait des décisions qui pourraient être ou non dans l'intérêt de l'enfant.

La tâche à résoudre, en fin de compte, est de trouver comment parler du bien-être de l'enfant. Nous savons que les enfants se sont habitués à l'idée de grandir dans une famille intacte. Les enfants qui ont reçu l'affection et l'attention voulues, qui se sentent en sécurité, seront suffisamment forts pour surmonter l'instabilité du divorce. Cela, nous le savons.

Nous avons vu, en fait — toujours dans cette récente étude sur les enfants au Canada — que ce n'est pas le fait qu'un enfant vive avec deux parents ou un parent qui importe. Nous savons que 75 p. 100 des enfants canadiens vivent avec leurs parents biologiques aujourd'hui; or on se rend compte que seulement un tiers des parents assurent à leurs enfants l'environnement nécessaire à leur bien-être.

Donc, ce que nous essayons de dire, c'est que ce qui compte, ce n'est pas le fait qu'un enfant vive avec deux parents ou un parent. C'est de savoir s'il a la stabilité voulue, si les règles et valeurs qui lui sont enseignées sont cohérentes. Rappelez-vous que lorsqu'il y a un conflit entre les parents, ils se montent l'un contre l'autre. Chacun veut être le bon parent et faire passer l'autre pour le mauvais, et il y a toujours celui qui essaiera de faire ce que l'autre interdit à l'enfant, pour obtenir la faveur de celui-ci.

C'est l'une des choses qui créé des problèmes de comportement chez les enfants, pas le fait d'aller d'un parent à l'autre, mais cette rivalité pour savoir lequel est le meilleur parent. Ce que nous voulons faire comprendre, c'est qu'il faut tenir compte de ce genre de choses lorsqu'on parle de droit de garde.

De nombreux parents qui ont la garde de leurs enfants aimeraient bien que l'autre parent assume davantage de responsabilités à l'égard des enfants. Dans bien des cas de garde et de droits de visite, la question n'est pas de savoir si le parent peut voir son enfant, mais si l'enfant peut voir le parent qui n'a pas sa garde.

Je crois que ce sont les arrangements qui permettent au parent qui a la garde et à l'autre parent de se partager les soins des enfants — en les emmenant chez le docteur, chez le dentiste, et custodial parent gives the child a sense of a continuity of care, that both parents care for the child's physical and mental well-being. But in cases where parents are using the children as pawns to control or punish the other parent, children need to be protected. In these cases, they should receive care from the parent who has a proven record of care and responsibility for the children.

In dangerous situations, children need the stability that continuity of caregiving and responsibility can bring. So the parent who had traditionally been responsible for the caregiving and the continuity may well be the parent who can provide that sense of stability and continuity for the child.

Furthermore, children's needs or desires may be undermined by parents wanting to use the child as a pawn to control or punish the other parent, especially around access, and there could be a mechanism that is triggered by the child in these instances. I think we need to talk about mechanisms that are triggered by children themselves. That could involve a neutral third party who would discuss the confusion, the intimidation and the conflict that the child feels between both parents, and help that child to be able to come to a good and reasonable resolution that is safe for the child, and that is child made, with, as I said before, someone who speaks for the child and who is neutral.

In many instances where there is conflict, there has to be one parent who is going to be able to make decisions on an emergency basis, or an urgent basis, to care for the child's well-being. We think it is important to recognize that this should be the parent who, again, is the custodial parent, who has been proven to be the nurturing and the sustaining parent, who has given the caregiving for the bulk of the time.

Thankfully, many parents come to a good agreement before they go to court, because there is enormous pain involved in the break-up of a marriage where children are involved. Where divorcing parents cannot agree on custody and access, there are no simple solutions, I think, that are pain-free to all parties.

We have to recognize that this is not about whose right it is to have the child but what the child's right is to live free from conflict, to be safe, to be loved, to be nurtured, remembering that children who are involved in very strong custody and access conflict tend more than anything to feel the pain of loyalty to both parents. When parents fight over children it creates this real behavioural problem for the child. The child eventually believes the child cannot make the right decisions at any one time. Many children run away from home because of this kind of polarization, which is caused by that kind of conflict.

One should be guided by principles that always consider what is best for the child, and not necessarily what is best for the parent. Of course we recognize that children can grow up safe and healthy in single-parent families. Our recent study on children in Canada has shown that in many single-parent families, children are growing up to be safe and to be healthy. But we recognize that where there is conflict, parents may not necessarily agree on rules of parenting, and may play the child off against the other, and that

cetera. — qui donnent aux enfants un sentiment de continuité, l'impression que les deux parents s'intéressent à leur bien-être physique et mental. Mais lorsque les parents se servent des enfants pour contrôler ou punir l'autre, il faut les protéger. Dans ces cas-là, les enfants devraient être pris en charge par le parent qui a prouvé qu'il est responsable et sait s'occuper de ses enfants.

Dans des situations dangereuses, les enfants ont besoin de la stabilité que confère la continuité des soins et des responsabilités. Et le parent qui a généralement assumé la responsabilité des soins et de la continuité pourrait bien être le parent qui pourra donner à l'enfant ce sentiment de stabilité et de continuité.

Les besoins ou désirs des enfants peuvent être sapés par le parent qui cherche à utiliser l'enfant pour contrôler ou punir l'autre parent, surtout lorsqu'il est question de droits de visite. C'est pourquoi il faudrait envisager un mécanisme qui pourrait être déclenché par l'enfant en pareilles circonstances. Je crois qu'il faut prévoir des mécanismes qui peuvent être déclenchés par les enfants eux-mêmes. Il pourrait s'agir d'une tierce partie neutre qui discuterait de la confusion, de l'intimidation et du conflit que l'enfant ressent envers ses deux parents, et l'aiderait à trouver une solution bonne et raisonnable qui soit sûre pour lui et qui serait prise par lui, avec, comme je l'ai dit tout à l'heure, quelqu'un de neutre qui parle en son nom.

Dans bien des cas où les parents sont en désaccord, il faut que l'un des deux puisse prendre des décisions en cas de crise, ou d'urgence, pour garantir le bien-être de l'enfant. Nous pensons qu'il est important que ce soit le parent qui a reçu la garde de l'enfant, qui a prouvé qu'il était le parent nourricier, qui s'est occupé de l'enfant la plupart du temps.

Heureusement, bien des parents s'entendent entre eux avant de se présenter devant les tribunaux, car l'échec d'un mariage est une situation extrêmement douloureuse lorsqu'il y a des enfants. Dans les cas où les parents ne parviennent pas à s'entendre sur la garde et le droit de visite, il n'existe pas de solution simple, à mon avis, qui soit sans douleur pour toutes les parties.

Nous devons reconnaître que l'important n'est pas de savoir qui doit avoir le droit de garder l'enfant, mais de se rappeler que l'enfant a le droit de vivre à l'abri des conflits, d'être en sécurité, d'être aimé, d'être soigné, en gardant à l'esprit que les enfants qui sont impliqués dans des luttes intenses pour l'obtention du droit de garde et de visite ont tendance avant tout à souffrir parce qu'ils se sentent déchirés entre leurs deux parents. Lorsque les parents se battent pour garder leurs enfants, cela entraîne de vrais problèmes de comportement chez l'enfant. Il finit par se dire qu'il est incapable de prendre la bonne décision. Bien des enfants s'enfuient de chez eux à cause de ce tiraillement que provoque chez eux ce genre de conflit.

Nous devons nous laisser guider par des principes qui prennent toujours en compte ce qu'il y a de mieux pour l'enfant, et non pas nécessairement ce qu'il y a de mieux pour les parents. Bien sûr nous reconnaissons que les enfants peuvent grandir en sécurité et en santé dans des familles monoparentales. Notre récente étude sur les enfants au Canada confirme que c'est souvent le cas. Mais nous reconnaissons que lorsque les parents sont en conflit, ils ne s'entendent pas toujours sur la façon d'élever leurs enfants et les

is more detrimental to the child. Having two parents play that child off against each other in terms of rules for the child — leniency on one the hand, and the other parent being the disciplinarian and the dictator on the other hand — creates just as serious problems for the child as the child having both parents to go to and to live with at all times.

What we're trying to say is that if we look always not at whose right it is to have the child or to see the child or to visit the child but look at the child under the four headings of what is a safe and secure place for that child to be — and that place may in some instances be only with one parent. That place may be happily with both parents. That place may be where they see more of one parent than the other, and there may need to be supervised access to another parent for a period of time. We have to recognize that it is the child's safety that is paramount, and not the parental need.

Secondly, there must be continuity of care — a home base, a place for the child to dig its roots in and to be able to feel that it can go to and come from and reach out and grow in independence, visiting the other parent, but knowing it has a place to come back to that is safe. That is as key and important in terms of continuity for the child as anything else.

Finally, there is a need to recognize that the child has to have an access area where the child has to be able to find someone, a neutral third party, when both parents are totally incapable of agreeing on what is in the best interests of the child. That child has to have the ability to have access to a third person who will listen to the child, who will advocate for the child, and who will find the best interests of the child, as always.

If we keep in mind those very clear guidelines for what is in the best interests of the child, not which parent wins and which parent loses, we will avoid doing harm. The task at hand is to make certain that children are well loved, safe and secure.

I want to close by reminding you of that old Bible story of King Solomon. Two mothers were fighting over a child, and each said the child was hers. He finally resolved it — and it is a resolution we must be careful not to make for our children, cutting them in two as if they were a table or chair — by suggesting that the child be cut in two, and each half be given to each parent. The mother of the child said, "This is not my child; give the child to the other person."

This is where, in the end, the person who loves and cares for that child most of all would be able to decide what is in the best interests of the child. That is always going to be evident in who decides which parents has rights, and not in what is decided for the best interests of the child.

If you bear that in mind, I think we will come up with some reasonable assumptions that are flexible, that take into consideration the independent conditions of families prior to divorce and separation — whether there was abuse or there wasn't abuse, what the levels of conflict were. Guided by these principles, I think we will be able to find something that will help

montent parfois contre l'autre parent, ce qui fait encore plus de tort aux enfants. Une situation où des parents se servent des principes d'éducation pour monter l'enfant contre l'autre parent — l'un des parents étant indulgent, et l'autre étant celui qui fait la discipline, le dictateur — créé des problèmes tout aussi graves pour l'enfant que s'il avait ses deux parents et allait vivre avec eux tout le temps.

Ce que nous voulons dire, c'est que si nous cherchons toujours à savoir, non pas qui doit avoir le droit de garder l'enfant ou de voir l'enfant ou de lui rendre visite, mais plutôt où cet enfant se sentirait bien et en sécurité... parfois ce sera chez un seul parent. Parfois ce pourrait être chez les deux parents heureusement. Et parfois ce pourrait être là où il verra davantage l'un des parents et verra l'autre dans le cadre de visites supervisées durant un certain temps. Nous devons reconnaître que c'est la sécurité de l'enfant qui est primordiale, et non pas le besoin des parents.

Il faut d'autre part qu'il y ait une continuité dans l'éducation—un endroit où l'enfant se sent chez lui, où il peut creuser ses racines et sentir qu'il peut aller et venir, et grandir en toute indépendance, tout en rendant visite à l'autre parent, mais en sachant qu'il a un endroit où il peut revenir et se sentir bien. Cela est aussi important que quoi que ce soit d'autre pour assurer une continuité dans la vie de l'enfant.

Pour finir, il faut reconnaître que l'enfant doit pouvoir aller quelque part pour rencontrer quelqu'un, un tiers neutre, lorsque les deux parents sont totalement incapables de s'entendre sur ce qui est dans l'intérêt de l'enfant. Cet enfant doit pouvoir s'adresser à une tierce partie qui l'écoutera, qui interviendra en son nom, et qui saura trouver ce qui est dans l'intérêt de l'enfant, comme toujours.

Si nous gardons à l'esprit ces principes très clairs voulant que l'on se préoccupe du bien de l'enfant et non pas de savoir lequel des parents perd ou gagne, nous éviterons de faire du mal. Notre tâche est de nous assurer que les enfants seront aimés et soignés comme il faut.

J'aimerais finir en vous rappelant l'histoire du roi Salomon, dans la Bible. Deux mères se battaient pour un enfant, chacune prétendant qu'il était à lui. Le roi a finalement trouvé la solution — et nous devons veiller à ne pas choisir ce genre de solution pour nos enfants, en les coupant en deux comme s'il s'agissait d'une table ou d'une chaise — en proposant de couper l'enfant en deux et d'en donner une moitié à chaque mère. La mère de l'enfant a réagi en disant «Cet enfant n'est pas le mien; donnez-le à l'autre personne».

C'est ainsi que la personne qui aime et s'intéresse à l'enfant plus que tout peut décider ce qui vaut mieux pour l'enfant. Ce sera toujours évident si quelqu'un décide lequel des parents a le droit d'avoir l'enfant, plutôt que ce qui convient le mieux pour l'enfant.

Si vous vous souvenez de cela, je crois que nous réussirons à établir des postulats raisonnables qui seront souples, qui prendront en considération les circonstances familiales avant la séparation et le divorce — qu'il y ait des antécédents de violence ou non et quels que soient les antagonismes. Si nous nous laissons guider par ces principes, je pense que nous parviendrons à trouver des

our children grow up safe, strong, nurtured and loved, and not used as furniture.

The Joint Chairman (Mr. Gallaway): Now we'll have Ms Blondin-Andrew. With her is Ms Patricia Walsh who, I understand, works actually in Health Canada.

Please proceed.

[Translation]

The Honorable Ethel Blondin-Andrew, Secretary of State (Children and Youth): It's a pleasure for me to be able to address the members of your distinguished committee.

I have been asked to speak on some native questions that are relevant to your study on provisions concerning child custody and access after a separation or a divorce.

[English]

I'm happy to do so, but will frame my remarks within the larger policy concerns applying to all Canadian children.

As indicated in "Securing our Future Together," this government believes in ensuring that children have the best possible start in life, and that all children are able to reach their full potential. As Secretary of State for Children and Youth, I'm very interested in the child custody and access issue as it pertains to the healthy development of all children.

The family, in its many forms, is a positive and essential unit that should be appreciated, supported and protected. Unfortunately, divorce and separation are challenges many Canadian children face. Children are often the innocent victims of conflict in the adult world.

I know you've heard already some testimony about the National Longitudinal Survey on Children and Youth. This is the long-term study undertaken by Human Resources Development Canada in cooperation with Statistics Canada.

The latest results were featured at a conference last week, and they will provide policymakers an opportunity to begin understanding the impacts of divorce and identify other risk factors to a child's healthy development.

What we do know, as my colleague has indicated, is that some 75 per cent of Canadian children live in the same household with both parents. At the same time, the percentage of children born to parents in common-law relationships has nearly doubled over the past decade.

Most children are doing well in adapting to such changes as moving to a new house, a new school, a new neighbourhood. However, we also know from the survey results that children of divorced parents are more likely to have behavioural and emotional problems.

This is not always the case, as my colleague's indicated, but these are the results of some of the information we've received from the study. solutions qui aideront nos enfants à grandir dans des conditions où ils se sentiront sûrs, forts, bien soignés et aimés, et non pas utilisés comme des meubles.

Le coprésident (M. Gallaway): Nous allons passer à Mme Blondin-Andrew. Elle est accompagnée de Mme Patricia Walsh qui, si je comprends bien, travaille en fait à Santé Canada.

Je vous en prie.

[Français]

L'honorable Ethel Blondin-Andrew, secrétaire d'État (Enfance et Jeunesse): C'est un plaisir pour moi que de pouvoir m'adresser aux membres de votre distingué comité.

Il m'a été demandé de vous parler de quelques questions autochtones pertinentes à votre étude sur les dispositions concernant la garde et le droit de visite des enfants après une séparation ou un divorce.

[Traduction]

C'est avec plaisir que je réponds à cette demande, mais mes commentaires s'inscriront dans le contexte plus large des politiques applicables à tous les enfants du Canada.

Comme nous l'avons indiqué dans «Assurer notre avenir ensemble», notre gouvernement croit qu'il faut donner à tous les enfants la possibilité de démarrer le mieux possible dans la vie, et de réaliser leur plein potentiel. À titre de secrétaire d'État à l'Enfance et à la Jeunesse, le dossier des droits de garde et de visite m'intéresse beaucoup dans la mesure où il touche au bon épanouissement de tous les enfants.

La famille, sous ses nombreuses formes, est une unité positive et essentielle qui devrait être appréciée, encouragée et protégée. Malheureusement, la séparation et le divorce sont des défis auxquels de nombreux enfants du Canada sont confrontés. Les enfants sont souvent les victimes innocentes des conflits du monde des adultes.

Je sais que l'on vous a déjà parlé de l'Enquête longitudinale nationale sur les enfants et les jeunes. Il s'agit de l'étude de longue haleine entreprise par Développement des ressources humaines Canada, en collaboration avec Statistique Canada.

Les résultats les plus récents ont été présentés lors d'une conférence la semaine dernière et ils permettront aux décideurs de commencer à comprendre les effets d'un divorce, ainsi que les autres facteurs de risque sur le bon développement des enfants.

Ce que nous savons, ainsi que ma collègue vous l'a dit, c'est que 75 p. 100 des enfants canadiens vivent sous le même toit que leurs deux parents. En même temps, la proportion d'enfants nés de parents qui vivent en union de fait a presque doublé au cours des dix dernières années.

La plupart des enfants s'adaptent bien lorsqu'ils ont à changer de maison, d'école et de quartier. Par contre nous savons aussi d'après les résultats de cette enquête, que les enfants de parents divorcés sont davantage susceptibles d'avoir des problèmes de comportement et des difficultés psychologiques.

Ce n'est pas toujours le cas, ainsi que vous l'a dit ma collègue, mais c'est ce qui ressort de certains des résultats de l'enquête que nous avons reçus. Likewise, the majority of children living with a single parent are doing well overall but are more likely to repeat grades at school, have poorer language skills, and poorer health. It also goes without saying that there are children who come from lone- or single-parent families who are well nurtured, well loved and who have all the opportunities that any other children are afforded, emotionally, psychologically and otherwise.

Our data then strongly suggests there are some factors associated with living in a lone-parent environment that prejudice child development. It does not mean that lone parenthood, per se, is the main factor, but that there is most likely a constellation of factors strongly associated with lone parenthood.

We must be careful not to stigmatize non-traditional families, especially single-parent families, while looking for ways to meet the needs of children living in different family and household arrangements. It is important to recognize that the development of children is affected by a complex interplay of risk factors such as low income, and protective factors such as good parenting. We have also learned that good parenting can help overcome exposure to risk.

Children who grow up in adverse conditions and are exposed to multiple risk factors, such as parental alcoholism or other addictions, low incomes, hostile parenting or poor health, are often the most vulnerable.

While results for aboriginal children are not available from this study, I think its implications should be considered in view of several indicators we do have.

To begin with, aboriginal children make up a larger proportion of their communities. About 40 per cent of aboriginal children are under 15, compared with 20 per cent of non-aboriginal Canadians. This is from the 1994 census. The Canadian Institute of Child Health has noted that while the bulk of Canadian population is aging into retirement years, the majority of aboriginal population is aging into reproductive years. Furthermore, aboriginal women are having more children and at a younger age than non-aboriginal women. This comes from *The Health of Canada's Children*, the second edition.

The testimony you have heard from various national and regional aboriginal organizations reveals a number of serious concerns that go beyond the statistics to the reality of aboriginal life. This testimony has generally addressed issues not directly related to the legal principles applied to the determination of child custody and access under the Divorce Act, but reveal a set of concerns about the impacts on children of the breakdown of marriages.

In preparing for this appearance, I discovered that there is not much published about the specific picture of marital breakdown in the aboriginal community or its impact on children. You've heard from aboriginal organizations about another aspect of child custody that is of great concern. Studies show that aboriginal

De la même façon, la majorité des enfants qui vivent avec un seul parent se débrouillent bien en général, mais sont davantage susceptibles de redoubler des classes, de moins bien s'exprimer et d'être en moins bonne santé. Il va sans dire également qu'il y a des enfants qui viennent de familles monoparentales qui ont toute l'attention et l'affection voulue et qui ont les mêmes possibilités que tous les autres enfants sur le plan moral, psychologique et autre.

Nos résultats indiquent néanmoins fortement qu'il y a certains aspects de la vie en famille monoparentale qui sont préjudiciables au développement de l'enfant. Cela ne veut pas dire que le fait d'élever un enfant seul soit en lui-même le problème, mais qu'il existe un ensemble facteurs liés à cette situation de famille monoparentale.

Nous devons prendre soin de ne pas déprécier les familles non traditionnelles, notamment les familles monoparentales, et chercher des façons de répondre aux besoins des enfants qui vivent dans des arrangements familiaux différents. Il est important de reconnaître que le développement des enfants dépend d'une interaction complexe de facteurs de risque, comme la faiblesse du revenu, et de facteurs positifs comme la qualité de l'éducation donnée par le parent. Nous avons également appris que la qualité de l'éducation peut contribuer à surmonter les facteurs de risque.

Les enfants qui grandissent dans de mauvaises conditions et sont exposés à de multiples facteurs de risque que constituent par exemple un parent alcoolique ou drogué, des faibles revenus, des parents agressifs ou une mauvaise santé, sont souvent les plus vulnérables.

Bien que l'étude ne nous donne pas de résultats pour les enfants autochtones, je crois qu'il convient d'analyser ses implications à la lumière de plusieurs indicateurs que nous possédons.

Pour commencer, les enfants autochtones représentent une plus grande proportion de leur population. Environ 40 p. 100 des enfants autochtones ont moins de 15 ans, par rapport à 20 p. 100 chez les Canadiens non autochtones. Ces données sont tirées du recensement de 1994. L'Institut canadien de la santé des enfants a constaté que le gros de la population du Canada s'approche de l'âge de la retraite, alors que chez les autochtones, la majorité de la population s'approche de l'âge de reproduction. Qui plus est, les femmes autochtones ont davantage d'enfants que les femmes non autochtones. Ces données sont tirées de la deuxième édition de *La santé des enfants du Canada*.

Les témoignages que vous avez reçus de la plupart des organisations autochtones nationales et régionales font ressortir de sérieuses inquiétudes qui vont au-delà des statistiques, et touchent à la réalité de la vie des autochtones. Ces témoignages ont mis en lumière des problèmes qui ne sont pas directement liés aux principes juridiques appliqués à la détermination des droits de garde et de visite des enfants, mais aux effets de l'échec des mariages sur les enfants.

Durant la préparation de mon intervention d'aujourd'hui, je me suis rendu compte que l'on n'avait pas publié grand chose qui donnerait une idée précise de la dissolution des mariages dans la communauté autochtone, ou de ses effets sur les enfants. Les organisations autochtones vous ont fait part d'un autre aspect du children are apprehended from their homes at an alarming rate. Of Canadian children and youth in care in 1996-97, 24.7 per cent were aboriginal. Yet these individuals represent only 4.5 per cent people up to the age of 20.

With respect to the central issue before this committee, I would make the following general observations and comments.

The Divorce Act provides for the sole criteria for the determining of the issue of custody to be in the best interests of the child. While I support this test, it is an extremely vague one. One way to improve the test would be to outline a series of factors to guide judges in determining what in fact are the best interests of the child.

In such a list, I would like to see included the importance, from an aboriginal perspective, of the extended family in raising a child and the desirability of preserving and enhancing the child's sense of culture and identity.

Fortunately, extended families are part of aboriginal tradition. In many cases, children who, for whatever reason, are unable to live with their parents, live with their relatives or grandparents. The custom of the extended family or the community taking over of a child is still quite common. In fact, extended families are expected to support the raising of children. That has its many challenges with the current system. It's a joint challenge between the federal government and the provinces.

I would also like to bring to the attention of the committee that the federal self-government policy provides that aboriginal peoples may negotiate self-government agreements that include law-making authority over property rights, marriage, adoption and divorce.

With regard to the United Nations Convention on the Rights of the Child, it is worthy of note that article 30 of this convention protects the rights of indigenous children to enjoy, in community with other members of his or her group, their culture and language. That has a direct relationship to what happens in these circumstances.

The Government of Canada encourages the development of culturally sensitive and child-centred policies for aboriginal children by all responsible authorities. More generally speaking, I would like to say it is extremely important that we do our utmost to ensure the healthy development of all Canadian children, whatever their cultural background and whatever family structure they find themselves in.

Consistent with this, this government has launched a number of initiatives that provide support to parents with the aim of ensuring the healthy development of their children. Prevention and early intervention for at-risk children have been the priorities, and specific measures have been taken to meet the pressing needs of aboriginal children in particular.

problème de la garde des enfants qui les inquiète beaucoup. Les études indiquent que les enfants autochtones sont retirés à leurs familles à un rythme alarmant. Parmi les enfants et les jeunes canadiens placés dans des foyers d'accueil en 1996-1997, 24 p. 100 étaient autochtones. Or ces individus ne représentaient que 4,5 p. 100 des jeunes gens de 20 ans et moins.

Concernant la question principale soumise à l'étude de votre comité, j'aimerais faire les observations et commentaires généraux suivants.

La Loi sur le divorce stipule que le seul critère à prendre en considération pour déterminer la garde d'un enfant doit être l'intérêt de cet enfant. Je suis d'accord avec ce principe, mais j'estime qu'il est extrêmement vague. Une façon de l'améliorer serait d'énoncer une série de facteurs pour guider les juges lorsqu'ils déterminent ce qui constitue vraiment l'intérêt de l'enfant.

Dans une telle liste, j'aimerais voir figurer, pour les autochtones, le rôle de la famille élargie dans l'éducation des enfants et l'intérêt de préserver et d'améliorer la connaissance de la culture et de l'identité de l'enfant.

Les familles élargies font heureusement partie de la tradition autochtone. Dans bien des cas, les enfants qui ne peuvent vivre avec leurs parents, pour quelque raison que ce soit, vivent avec d'autres membres de leur famille, parfois avec leurs grandsparents. La coutume qui veut que la famille élargie ou la communauté s'occupe d'un enfant lorsque les parents ne peuvent le faire est encore très courante. De fait, la famille élargie est censée participer à l'éducation des enfants. Cela pose de nombreuses difficultés dans le contexte du système actuel. Ce sont des questions que le gouvernement fédéral et les provinces devront régler ensemble.

J'aimerais également porter à l'attention du comité le fait que la politique d'autonomie gouvernementale des autochtones prévoit que les peuples autochtones peuvent négocier des ententes qui comprennent l'autorité de faire des lois régissant les droits de propriété, le mariage, l'adoption et le divorce.

Il vaut la peine de noter que la Convention des Nations unies sur les droits des enfants prévoit, à l'article 30, la protection du droit des enfants autochtones de jouir, en communauté avec les autres membres de son groupe, de leur culture et de leur langue. Ceci a un rapport direct avec ce qui se passe dans ces circonstances.

Le gouvernement du Canada encourage les autorités responsables à élaborer des politiques axées sur les enfants, qui soient sensibles à leur culture, pour tous les enfants autochtones. De façon plus générale, j'aimerais dire qu'il est extrêmement important de faire tout notre possible pour assurer le bon développement de tous les enfants canadiens, quelle que soit la culture et quel que soit le type de famille dont ils sont issus.

Conformément à ce principe, le gouvernement actuel a lancé un certain nombre d'initiatives pour aider les parents à assurer le bon développement de leurs enfants. Les programmes de prévention et d'intervention précoce pour les enfants à risque ont reçu la priorité, et des mesures particulières ont été prises pour répondre aux besoins pressants des enfants autochtones en particulier.

The initiatives include: the Community Action Program for Children; the Canada Prenatal Nutrition Program; the Aboriginal Headstart Program, which now applies to all aboriginal peoples; and the First Nations and Inuit Childcare Program.

With regard to the impacts of divorce and separation, minimizing the stress and the changes to the child and his or her environment is important in ensuring a smooth transition in an already difficult situation. I think that was very aptly put by my colleague, the Secretary of State for the Status of Women.

I would also like to draw your attention to a Health Canada publication, "Because Life Goes On." This booklet is used extensively by parents, the legal, health and social services professions, and offers suggestions to help children cope with separation and divorce.

Because you don't have a restriction on props, I'd like to let you know that this publication is available, and widely used. It's much subscribed to.

In closing, I encourage the committee to consider the issue of aboriginal child custody and access in its different aspects and to identify areas requiring further research to build public policy in this area.

It is a common complaint — and it is a common condition of polls and surveys and census taking — that for various reasons, some of which the responsibility is owned by different parties, including the aboriginal people themselves, we do not have the kind of information and data we need to build a frame of reference and to set some baseline data in order to make the kind of policy statements or even mission statements.

We as a government have attempted to do early intervention programs that have allowed for the healthy development of all children. In particular, where we have a high and fast-growing population of aboriginal people, we've made that special effort. But really, the committee should consider that there is much more work required.

I think perhaps the traditional modes of gathering information and data are not conducive to dealing with remote and isolated communities where, for the most part, you have oral traditions, where paper and the amount of information processing in the way we do it with other groups is probably not the best way. Usually a hands-on approach is the best.

So I think that should be a consideration given to the work you're undertaking, that you're dealing with a process that has a gap, really, an information gap.

I'm not saying the department or the various agencies that undertake to do this aren't doing a good job. It's an extremely difficult thing to do. You need consensus if you go for information, and that's not always there. However, it's also an investment. In many of the surveys and polls that are taken, it's

Parmi ces initiatives: le Programme d'action communautaire pour les enfants; le Programme canadien de nutrition prénatale; le programme Bon départ à l'intention des autochtones qui s'applique désormais à tous les peuples autochtones; et le Programme de garde d'enfants des Premières nations et des Inuits.

En ce qui concerne les effets du divorce et de la séparation, il est important de minimiser le stress et les changements pour l'enfant et son environnement afin d'assurer une transition en douceur dans une situation déjà difficile. J'estime que ma collègue, la secrétaire d'État à la Situation de la femme, a très bien expliqué cela.

J'aimerais également attirer votre attention sur une publication de Santé Canada, «Parce que la vie continue». Cette brochure est très utilisée par les parents, les professionnels du système judiciaire, de la santé et des services sociaux, et avance des propositions pour aider les enfants et les adolescents à surmonter les problèmes de la séparation et du divorce.

Puisque vous n'avez pas de restrictions sur les accessoires, j'aimerais vous faire savoir que cette publication est disponible et largement utilisée. Elle a de nombreux abonnés.

En terminant, j'aimerais encourager votre comité à examiner la question des droits de garde et de visite des enfants autochtones sous ses aspects différents, et à cerner les points qui devraient faire l'objet de recherches plus approfondies dans le but d'élaborer des politiques dans ce domaine.

On se plaint couramment du fait que — et cette réalité se retrouve en général dans les sondages et les études, et les recensements — pour diverses raisons, dont la responsabilité revient à diverses parties, y compris les autochtones eux-mêmes, nous n'avons pas les informations et données nécessaires pour créer un cadre de référence et établir des données de base qui nous permettraient d'élaborer des énoncés de principes ou même des énoncés de mission.

Notre gouvernement a tenté de mettre en oeuvre des programmes d'intervention précoce pour favoriser le bon développement de tous les enfants. Nous avons fait un effort particulier là où il existe une population autochtone importante, qui croît rapidement. Mais vraiment, votre comité devrait savoir qu'il reste encore beaucoup à faire.

Peut-être notre façon traditionnelle de rassembler les informations et données ne conviennent-elle pas pour les localités éloignées et isolées où, la plupart du temps, il existe des traditions orales, où notre façon de recueillir et de traiter les informations sur papier comme nous le faisons pour les autres groupes n'est certainement pas idéale. Il conviendrait de trouver une méthode plus pratique.

Je pense donc que vous devriez tenir compte de cela dans vos travaux; vous avez affaire à un processus qui comporte une lacune, vraiment, une lacune dans l'information disponible.

Je ne dis pas que les ministères ou les divers organismes qui s'occupent de cela font mal leur travail. Il s'agit d'une tâche extrêmement difficile. Il faut un consensus lorsqu'on cherche de l'information, et celui-ci n'existe pas toujours. Mais c'est également un investissement. Dans beaucoup de sondages qui ont

deemed to be too remote, too far, too expensive to bother. I think that has to change.

In closing, Mr. Chairman — and I beg your indulgence — I wish you the very best with your deliberations. I know this is a very complicated issue. I look forward to reading your recommendations.

Thank you for your time and attention. Mushi cho.

The Joint Chairman (Mr. Gallaway): Colleagues, there are 16 of us here today. We do have a finite period of time. I would please ask you, if you can — or if you're not going to ask questions, that's fine — to please be as precise as possible.

We'll begin questioning with Ms Grey.

Ms Deborah Grey (Edmonton North, Ref.): I would like to start by thanking the committee for the tremendous amount of work you've done across the country. I wasn't able to be part of those deliberations, although I did stop in, in my home city of Edmonton, and was fascinated by the stories of people I heard there, people who took time out of a business day to come and plead with some members of this committee to talk about their own personal situations. A lot of them are hurting.

I guess I'd start, being a visitor here, by just looking around the room.

Hedy, I see the women who are with you, and appreciate the work you've done. Were any men in on any of these expert consultations you've been doing?

Ms Fry: Three papers have come out of Status of Women Canada's research facilities, and in two of those three, there were men involved.

Ms Grey: Okay.

And members of the committee, are you people all visiting here today, or were there a number of men sitting on this committee? I'm just interested.

The Joint Chairman (Mr. Gallaway): That's an unusual way to pose a question.

Voices: Oh. oh!

Ms Grey: Roger, are you the only Liberal member on this committee? I understand you're the Chair, and you've been here. I know you're not a visitor, sir.

The Joint Chairman (Mr. Gallaway): I would say the turnout today, just for your own information, is reflective of the committee.

Ms Grey: Very good.

Hedy, I want to ask you a couple of questions here, specifically on one thing you said regarding non-custodial parents. You said the issue is not whether or not non-custodial parents get to see their kids but whether the child gets to see the non-custodial parent.

été réalisés, il a été jugé que ces régions étaient trop loin, trop isolées et qu'il reviendrait trop cher de s'y rendre. J'estime que cela doit changer.

Pour terminer, monsieur le président — et je vous prie de m'accorder toute votre indulgence — je vous souhaite bonne chance dans vos délibérations. Je sais qu'il s'agit d'une question fort complexe. J'ai hâte de lire vos recommandations.

Merci de m'avoir accordé votre temps et votre attention. Mushi cho.

Le coprésident (M. Gallaway): Mes chers collègues, nous sommes 16 ici aujourd'hui. Nous disposons d'une période de temps limitée. Je vous demanderais donc, si vous le — ou si vous n'avez pas de question à poser, c'est bien — d'être aussi précis que possible.

Nous allons commencer avec Mme Grev.

Mme Deborah Grey (Edmonton-Nord, Réf.): J'aimerais tout d'abord remercier votre comité pour l'énorme travail accompli dans tout le pays. Je n'ai pas pu participer aux délibérations, mais je suis néanmoins allée vous écouter chez moi, à Edmonton, et j'ai été fascinée par certaines histoires que j'ai entendues là, racontées par des gens qui avaient pris du temps sur leur journée de travail pour venir plaider auprès des membres du comité et parler de leur situation personnelle. Beaucoup d'entre eux souffraient.

Je crois que puisque je suis invitée ici, je vais commencer par jeter un coup d'oeil dans la salle.

Hedy, je vois les femmes qui sont avec vous et j'apprécie le travail que vous avez fait. Des hommes ont-ils participé à ces consultations d'experts que vous avez effectuées?

Mme Fry: Trois documents ont été émis par les services de recherche du bureau de la Situation de la femme et dans deux de ces trois cas des hommes ont participé.

Mme Grey: D'accord.

Et vous, les membres du comité, êtes-vous tous invités, aujourd'hui, ou y a-t-il eu des hommes qui faisaient partie de votre comité? Je veux simplement savoir.

Le coprésident (M. Gallaway): C'est une façon bien singulière de poser une question.

Des voix: Oh, oh!

Mme Grey: Roger, êtes-vous le seul député libéral à siéger à ce comité? Je sais que vous êtes le président, et que vous avez été là. Je sais que vous n'êtes pas invité.

Le coprésident (M. Gallaway): Je dirais, pour votre gouverne, que l'assemblée d'aujourd'hui est représentative du comité.

Mme Grey: Très bien.

Hedy, j'aimerais vous poser quelques questions, en particulier à propos de ce que vous avez dit sur les parents qui n'ont pas la garde. Vous avez dit que la question n'est pas de savoir si le parent non gardien peut voir son enfant, mais plutôt si l'enfant peut voir son parent.

Does that mean, then, that children have the total say in this, that maybe the non-custodial parent...? Can you see their frustration, that they feel they don't have a great say in whether they get to see their kids or not?

Ms Fry: I recognize fully the frustrations that occur on either side by both parents, custodial and/or non-custodial. I'm saying what we need to focus on is the issue that it is not whether we're talking about parental rights here; we're talking about the rights of the child. We should always, when we get into a problem of conflict, focus firmly on what is going to be the best thing for the child, not necessarily the best thing for the parent.

Ms Grey: Okay.

You also said that the child needs a neutral third party. Who might that be? Who is neutral in a case when there is such tremendous pain in a family? Who would you recommend to be a neutral third party?

Ms Fry: I didn't say the child always needs a neutral third party, but in certain cases where the the child is confused and doesn't know what to do, and is suffering a great deal of pain and anger and frustration, then the child needs to have someone to go to who is going to look at the child's issue from the child's point of view.

There are many people — social workers, child advocate mediators, psychologists — who have spent a lot of time dealing with how to help children go through a divorce and separation, how to listen to the child for a change, as opposed to the parents, who tend to be the ones whose lawyers do a lot of the talking. How do we get somebody who listens to the child and thinks of the child and hears what the child is saying? And there are people for whom that is their profession; that's what they do.

Ms Grey: I am a child of a divorced family. My parents split up when I was quite young. I can remember some of those sessions with the neutral third party. For me, that was a more frightful experience than listening to my alcoholic father go on a rage at home. I'm sorry to say that, but that is very true.

We went to the mental health centre, and the neutral third party seemed to have more of an agenda for me, as one of the children in this divorce situation.

I'm wondering what we can do to help that situation, because I see a tremendous responsibility for those professional people, and I'm scared to think sometimes that they may have been coerced by a particular agenda, which doesn't help the kids.

Ms Fry: I think, Deborah, that is a very good reason that forced or mandatory mediation is not the best thing. I think you've just given a very good reason as to why it isn't the best way to go.

We're talking about a child-triggered mechanism. If a child requests that they really want to talk to somebody because they can't talk to mommy and they can't talk to daddy, then the child can trigger that. So we're talking about a time when, if a child wishes to, a child can trigger a neutral person.

Cela veut-il dire que ce sont les enfants qui vont tout décider dans cette affaire, et que peut-être le parent qui n'a pas la garde...? Pouvez-vous comprendre leur frustration, parce qu'ils ont l'impression qu'ils n'ont pas grand-chose à dire pour déterminer s'ils pourront voir leurs enfants ou non?

Mme Fry: Je reconnais entièrement les frustrations des deux parents, de celui qui a la garde et de l'autre. Ce que je veux dire, c'est qu'il faut se rappeler que ce ne sont pas les droits des parents qui doivent être au coeur du débat; nous parlons des droits de l'enfant. Nous devrions toujours, lorsque nous avons affaire à un conflit, nous concentrer fermement sur ce qui sera dans l'intérêt de l'enfant, mais pas nécessairement la meilleure chose pour le parent.

Mme Grey: D'accord.

Vous avez dit aussi que l'enfant a besoin de pouvoir s'adresser à une tierce partie neutre. Qui cela pourrait-il être? Qui peut être neutre lorsqu'une famille vit une situation aussi douloureuse? Qui recommanderiez-vous?

Mme Fry: Je n'ai pas dit que l'enfant a toujours besoin d'un tiers neutre, mais seulement dans certains cas lorsqu'il est désorienté et ne sait pas quoi faire, qu'il ressent beaucoup de peine, de colère et de frustration, c'est alors qu'il a besoin de s'adresser à quelqu'un qui examinera son cas de son point de vue.

Il y a bien des gens — des travailleurs sociaux, des médiateurs qui défendent les intérêts des enfants, des psychologues — qui ont passé beaucoup de temps à chercher comment aider les enfants à surmonter un divorce ou une séparation, comment les écouter pour changer, plutôt que les parents, qui se trouvent être ceux dont les avocats parlent beaucoup. Comment trouver quelqu'un qui écoute l'enfant et pense à l'enfant et écoute ce qu'il a à dire? Il y a des gens dont c'est la profession; c'est ce qu'ils font.

Mme Grey: Je viens d'une famille divorcée. Mes parents se sont séparés lorsque j'étais très jeune. Je me souviens de certaines de ces séances avec des tiers neutres. Pour moi, c'était bien plus effrayant que d'entendre mon père, qui était alcoolique, faire une crise à la maison. Je suis désolée, mais c'est vrai.

Nous allions au centre de santé mentale et la tierce partie neutre avait l'air d'avoir un programme plus chargé pour moi, qui était l'un des enfants impliqués dans cette histoire de divorce.

Je me demande ce que nous pouvons faire pour aider, car je crois que ces professionnels ont une énorme responsabilité et je crains que parfois ils ne se sentent obligés d'intervenir en vertu de principes particuliers, qui n'aident pas forcément les enfants.

Mme Fry: C'est pourquoi je pense, Deborah, que la médiation forcée ou obligatoire n'est pas la meilleure des choses. Je crois que vous venez de donner une très bonne raison qui explique pourquoi ce n'est pas la meilleure façon de procéder.

On parle d'un mécanisme qui doit être déclenché par l'enfant. Si un enfant demande à parler à quelqu'un parce qu'il ne peut pas parler à sa maman et qu'il ne peut pas parler à son papa, alors il peut faire appel à une personne neutre.

At times like this, I think many children sometimes need a neutral person to talk to.

Ms Grey: The scary thing is, when you're a kid, when you think someone's neutral, even with your kid's mind you can figure out after one or two meetings that they're not even close to neutral. That to me is the frightening thing.

Just one last comment in closing up. In your reference to King Solomon, you forgot the first part of the story, Hedy, that there were two mothers who gave birth — in 1 Kings, Chapter III — and the one baby had died. So when they went with the second one to do the tug-of-war with that child, King Solomon tried to come up with something. Let's get the whole story, the well-rounded view, before we start talking about carving children up like furniture. It was taken out of context.

Ms Fry: No, I think it still came down to the fact that there was one child to be distributed between two people. One person felt that the child was not chattel, that the child should go intact with one person, and was prepared to give that child up.

I think that was what I was trying to bring out, the fact that people tend to do, when they love their children, what is best for the child, quite often.

Ms Grey: Granted, but the fact that one child was dead already is I think a fairly major part of the story that you forgot.

Anyway, that's the context of it, and I appreciate your comments.

Senator Mabel M. DeWare (Moncton, PC): I want to thank you very much for coming before the committee today. As you know, we've been around, and around, and around, and around — and I think we're going to go around some more.

During our hearings we did manage to have two children before the committee, all properly done. One of our senators plus staff had a videoconference with some of them. Their message to us was, how old do we have to be before somebody is going to listen to what we want, to who we want to live with? You could tell that they were terribly frustrated. They had gone through kind of bad experiences.

It was interesting; one girl came in support of her sibling, because the family had been torn apart. One was living with one and one with the other, and they wanted to be together, which she came in support of.

That's what you're saying — in the best interests of the children. Really, the whole committee realizes that.

There is a lot of emotional abuse out there. Family violence has to be taken into consideration. We did have, as you know from reading the transcripts, a lot of men's organizations come before the committee. Dans de telles situations, je crois que les enfants ont souvent besoin de parler à quelqu'un qui soit neutre.

Mme Grey: Ce qui fait peur, pour un enfant qui pense qu'une personne est neutre, c'est que même avec son esprit d'enfant, il se rend compte au bout d'une ou deux séances, que cette personne est bien loin d'être neutre. Pour moi, c'est cela qui fait peur.

J'aurais un dernier commentaire avant de finir. Lorsque vous avez évoqué le roi Salomon, vous avez oublié la première partie de l'histoire, Hedy, celle où il est dit que les deux mères avaient donné naissance à un fils — dans Rois 1, III — et que l'un d'eux était mort. Et lorsqu'elles se sont présentées devant le roi Salomon pour se disputer l'enfant qui avait survécu, le roi Salomon a essayé de trouver une solution. Il faut connaître toute l'histoire, avoir une bonne vue d'ensemble, avant de parler de couper les enfants en deux comme des meubles. Vous avez présenté l'histoire hors de son contexte.

Mme Fry: Non, je crois que le fond de l'histoire était le même; il y avait un seul enfant à répartir entre deux personnes. L'une d'elles a estimé que l'enfant n'était pas un bien meuble et qu'il devrait être confié intact à une personne, et elle était prête à renoncer à l'enfant.

C'est cela que j'essayais de faire comprendre, le fait que lorsqu'ils aiment leurs enfants, les gens ont très souvent tendance à faire ce qu'il y a de mieux pour eux.

Mme Grey: Je vous l'accorde, mais le fait qu'un enfant était mort constitue un aspect important de l'histoire que vous avez oublié.

Quoi qu'il en soit, nous connaissons maintenant le contexte. Je vous remercie de vos commentaires.

Le sénateur Mabel M. DeWare (Moncton, PC): J'aimerais vous remercier vivement de vous être présentée devant notre comité aujourd'hui. Comme vous le savez, nous nous sommes déplacés, et déplacés, et déplacés — je crois que nous allons continuer à nous déplacer.

Au cours de nos audiences, nous avons réussi à obtenir les témoignages de deux enfants. Cela s'est très bien passé. L'un de nos sénateurs, accompagné de personnel, a tenu une conférence vidéo avec certains d'entre eux. Ils nous ont demandé quel âge il fallait qu'ils atteignent pour que quelqu'un les écoute enfin pour savoir ce qu'ils veulent, avec qui ils veulent vivre? Il était évident qu'ils étaient terriblement frustrés. Ils avaient vécu des expériences plutôt négatives.

C'était intéressant; l'une des filles avait pris la défense de sa soeur, car la famille avait été déchirée. L'une vivait avec un parent et l'autre avec l'autre, et elles voulaient être ensemble. C'est ce qu'elles voulaient.

C'est ce que vous dites -1 faut rechercher le bien des enfants. Tout le comité en est conscient.

Il y a beaucoup de violence psychologique. Il faut prendre en considération la violence familiale. Comme vous avez pu le constater en lisant les transcriptions, de nombreuses organisations d'hommes se sont présentées devant notre comité.

One of the things that was of concern to me — and I'm just going to say this one thing — is when there's been false accusations, and a father or mother has been falsely accused of abuse. You made the statement that if it's a false accusation, nothing's lost, and the child can return to that parent. Well, apparently it doesn't quite work that way. If there's been a false accusation, it may take a couple of years for the person to prove that it was a false accusation. By this time there's been no contact with that particular child for that time, either by mom or dad.

How do we get this child back into the family context again with that particular person? It's going to have to be probably supervised access. They could be total strangers after a couple of years, and at a cost. We're wondering how we can avoid that.

I don't know how you can avoid that, because we're talking about people, and you can't always direct it, but how do we make people understand the seriousness of that?

Can we do that, do you think, through an education program that the parents would have to attend — not necessarily together, as you know — to show them what divorce can do to children?

Ms Fry: That's an interesting question. There's no black or white answer to it.

First and foremost, on what you said about the length of time to address the issue of false accusations, that has to be speeded up. So I think we want to talk about how we shorten that timeframe.

We also do not want to hamstring the hands of the judge, or whoever's looking at the issue of false allegations, by not allowing them access to all of the experts that may or may not have talked to the child to get to the bottom of this. On the one hand, you want to make sure that the child is protected from the potential for harm. And the question is, if the allegation was not false, then the child had been in a harmful situation and had been exposed to further harm. That's the first thing you want to prevent. That's why it's not simple. It must speedily resolved.

And you want to be very careful. In many instances, the thought of throwing people into jail, if they came up with an accusation, doesn't stop people from talking about allegations and questions and concerns they all may or may not have. We know that if a false allegation occurs anyway, the courts are very clear on perjury. So you have already court processes to deal with the issue of perjury and the issue of lying.

So it's important to have speedy resolution of the problem; it's important to make sure that you err on the side of safety of the child; and it's important to recognize that there are processes for perjury, if it so happened that it turned out to be perjury. Erring on the side of safety of the child is the very first thing, and ensuring that you don't stop people who have allegations — and who are afraid, if they cannot prove them, that they'll be sent to jail — from speaking out at all. It's that fine balance, individual cases being taken into consideration by the courts. I think.

Ce qui m'inquiète — et je me contenterai de dire ceci — ce sont les fausses accusations, lorsqu'un père ou une mère est faussement accusé d'avoir été violent. Vous avez dit que s'il s'agit d'une accusation fausse, rien n'est perdu, et qu'il est toujours temps de rendre l'enfant à ce parent. Les choses n'ont pourtant pas l'air de se passer ainsi. Lorsqu'une personne a été faussement accusée, il peut s'écouler plusieurs années avant qu'elle puisse le prouver. Et durant tout ce temps, il n'y aura eu aucun contact entre cet enfant particulier et son père ou sa mère.

Comment faisons-nous pour que l'enfant recrée des liens familiaux avec cette personne-là? Il faudra probablement prévoir des visites supervisées. Les deux peuvent être totalement étrangers l'un à l'autre après quelques années. Nous nous demandons comment éviter cela.

Je ne sais pas comment nous pouvons éviter cela, car on parle de personnes, et l'on ne peut pas toujours tout contrôler, mais comment fait-on pour que les gens comprennent la gravité de la chose?

Pensez-vous que nous pouvons y arriver avec un programme d'information auquel les parents seraient obligés d'assister — pas forcément ensemble, comme vous savez — pour comprendre ce que le divorce peut faire aux enfants?

Mme Fry: C'est une question intéressante. Il n'y a pas de réponse noire ou blanche.

Tout d'abord, en ce qui concerne le temps qu'il faut pour prouver qu'une accusation est fausse, il faut accélérer ce genre de chose. Il faut donc voir comment nous pouvons réduire la durée de ces démarches.

Mais nous ne voulons pas lier les mains du juge non plus, ou de qui que ce soit qui examine la question des fausses allégations, en ne les laissant pas consulter tous les experts qui peuvent avoir ou ne pas avoir parlé à l'enfant pour clarifier la situation. D'un côté on veut s'assurer que l'enfant est à l'abri de tout éventuel danger. Car si l'allégation n'est pas fausse, cela veut dire que l'enfant se trouvait en danger et risquait de se faire maltraiter davantage. C'est la première chose que l'on veut éviter. C'est pourquoi ce n'est pas si simple. Il faut résoudre le problème le plus rapidement possible.

Et il faut faire très attention. Dans bien des cas, l'idée de faire mettre quelqu'un en prison, s'il porte des accusations, n'empêche pas les gens de faire des allégations et de parler de questions et préoccupations qu'ils peuvent avoir ou non. Nous savons que si quelqu'un fait une fausse allégation, les tribunaux sont très clairs en ce qui concerne le parjure. Il y a donc déjà les procédures du tribunal qui s'appliquent aux cas de parjure et de mensonge.

Il est donc important de résoudre rapidement le problème; et il importe de s'assurer qu'en cas de doute il vaut mieux être trop prudent et protéger l'enfant; et il importe de savoir qu'il existe des procédures judiciaires pour les cas de parjure, s'il s'avère qu'il y a eu parjure. Se tromper par excès de prudence en favorisant plutôt la sécurité de l'enfant est la première chose à faire, et s'assurer que l'on n'empêche pas les gens qui veulent porter des accusations — et qui ont peur de se faire jeter en prison s'ils n'arrivent pas à prouver les faits — de s'exprimer. C'est ce juste

Senator DeWare: How do we speed it up? We have one case, a divorce situation, where the judge hasn't even talked to them for 18 months.

I would like the opinion of either one of you on how you feel about unified family courts. Can we strengthen those, and can they do some of this process for us?

Ms Fry: I think unified family courts might actually speed up that process. I think it might make the system work better, and I think it might be exactly what we need to shorten that timeframe — again, ensuring that there is ample access to representation and to legal aid for persons involved who do not have the adequate resources.

The Joint Chairman (Senator Landon Pearson (Ontario, Lib.)): Ms Blondin, do you want to answer that question as well, on the unified family court?

Ms Blondin-Andrew: I think any approach that helps to expedite the whole process and to reduce the pain and discomfort to children is something that should be supported.

Senator DeWare: I don't want to monopolize this, but I was very pleased to see you, in your report, talk about extended families, which I think a lot of us agree is a very important part of this issue. We're trying to rectify something that's gone wrong in that.

I was also pleased in your intervention here to see prevention and early intervention, which, coming from New Brunswick, we have quite a bit to do with. Really, it works, if it's done properly and in time.

I appreciate your having those comments in your statement.

Ms Carolyn Bennett (St. Paul's, Lib.): Thank you very much.

It really seems that a lot of the witnesses who came here were from education and resources. I guess we would hope from the committee, when these recommendations come forward, that you would be able to help us with the piece that would involve making sure that the resources to have child-centred solutions would be in place in either unified family courts, or such things as videos before people could file their divorce papers.

From Ms Grey's point of view, and in terms of the friend of the court or the kind of support for children to be able to actually tell their story effectively, I think this seemed to be one of the most poignant lessons, particularly for those of us who got to meet with some of the children.

We saw children's advocates who had absolutely no training, who just said what the kids told them to say, with no analysis. One of the things I feel is that if a child says they never want to see one of the parents again, to me, as a family physician, that is an

équilibre qu'il faut trouver, je crois, dans chaque cas examiné par les tribunaux.

Le sénateur DeWare: Comment faites-vous pour accélérer les choses? On nous a signalé un cas, un problème de divorce, où le juge n'a même pas parlé aux intéressés depuis 18 mois.

J'aimerais avoir l'opinion de l'une ou l'autre d'entre vous deux sur les tribunaux unifiés de la famille. Pouvons-nous les renforcer et peuvent-ils se charger d'une partie de ces démarches?

Mme Fry: Je pense que les tribunaux unifiés de la famille pourraient en fait accélérer ces démarches. Je crois que cela permettrait au système de mieux fonctionner, et je pense que c'est peut-être exactement ce dont nous avons besoin pour réduire la durée des démarches — toujours en veillant à ce que les personnes concernées qui n'en ont peut-être pas les moyens, soient représentées et aient accès à l'aide juridique nécessaire.

La coprésidente (le sénateur Landon Pearson (Ontario, Lib.)): Madame Blondin, voulez-vous également donner votre opinion sur les tribunaux unifiés de la famille?

Mme Blondin-Andrew: Je crois que tout ce qui peut aider à accélérer le processus et à atténuer la souffrance et le malaise des enfants doit être encouragé.

Le sénateur DeWare: Je ne veux pas monopoliser le débat, mais j'ai constaté avec plaisir que vous avez parlé, dans votre rapport, des familles élargies qui, nous sommes nombreux à l'admettre, ont un rôle important dans toute cette affaire. Nous essayons de rectifier quelque chose qui a été mal compris dans ce domaine.

J'ai également été heureuse de voir, dans votre intervention, que vous parlez de prévention et d'intervention précoce, ce qui, au Nouveau-Brunswick, nous intéresse beaucoup. Vraiment, ça marche, si c'est fait comme il faut et en temps voulu.

J'apprécie que vous ayez inclus ces choses-là dans vos déclarations.

Mme Carolyn Bennett (St. Paul's, Lib.): Merci beaucoup.

Il me semble que bon nombre des témoins qui sont venus ici venaient des secteurs de l'information et des ressources. J'espère que lorsque le comité élaborera ses recommandations, vous pourrez nous aider à nous assurer que les ressources nécessaires à la mise en oeuvre des solutions axées sur l'enfant seront en place, soit dans les tribunaux unifiés de la famille, soit sous forme de choses comme des vidéos que les gens devront regarder avant de pouvoir demander le divorce.

Concernant ce que nous a dit Mme Grey, à propos de la présence d'un intervenant désintéressé dans le système judiciaire ou du genre d'aide dont les enfants ont besoin pour pouvoir conter leur histoire efficacement, je pense que ceci est l'une des leçons les plus touchantes que nous ayons apprises, et plus particulièrement ceux d'entre nous qui ont rencontré certains de ces enfants

Nous avons vu des défenseurs des droits des enfants qui n'avaient absolument aucune formation et qui se contentaient de répéter ce que les enfants leur avaient dit, sans aucune analyse. J'estime que si un enfant dit qu'il ne veut plus jamais revoir l'un alarm bell, and we should treat that as though one of their parents just died.

If in our society one of the parents just died, we would put all of our psycho-social support in for that child. I would hope that we could develop programs that would identify these children at risk who, ten years later, are going to be in big trouble because they will either feel they were duped that they didn't get to see one of their parents or that no one actually investigated why they decided this, and maybe it is a history of abuse or something like that.

As we've been looking at the child-centred solutions, I think we need some commitment from our ministers that there will be a fight for the resources necessary to deal with this properly.

The Joint Chairman (Senator Pearson): Is that a question or a comment?

Ms Bennettt: It's not a question, but — well, it's a question: Do we have a commitment?

Ms Blondin-Andrew: I'd like to think that everything we do in this rather complex and difficult situation is to minimize the negative impact on children. It would be great to think that we could find solutions and not interim measures, but this is not an easy thing. Divorce and separation and the dissolution of family is really the dissolution, in some cases, of a child's world view, and their world essentially. It's a very complex issue.

In order to make the situation more liveable, more acceptable to children — and I think that's the goal — if that takes resources to educate people, I think one of the keys is early intervention. If you're a better parent, if you're a better nurturer, and if you have the wherewithal to be a healthy parent, I think you'll recognize what is the priority that should be placed on children in these circumstances.

Ms Bennett: I guess what I'm trying to say is that one of the problems in advice to change the Divorce Act is that it becomes a justice issue, because the door in is that they come because they need something from the courts. What those of us who have spent a lot of time in this field feel is that this adversarial thing isn't working, and it's actually a social issue, not really a justice issue. But I don't think we're going to get a less adversarial result unless we put in place the mediation and the social fabric or the safety net for our society so that we can show people that going to court is really the last resort, and rarely in the best interests of kids.

Ms Blondin-Andrew: Maybe I could finish what I was saying. The resources we invest into building better parenting skills is to that end — to recognize the circumstances that child or those children are in, and to make the best possible choices in an already complex and difficult situation.

de ses parents, pour moi, qui suis médecin de famille, cela constitue une sonnette d'alarme, et nous devrions traiter cela comme si l'un des parents venait de mourir.

Dans notre société, lorsqu'un parent vient de mourir, nous donnons toute l'aide psychosociale dont nous disposons à cet enfant. J'espère que nous parviendrons à mettre sur pied des programmes qui permettront d'identifier les enfants à risque qui, dix ans plus tard, auront de graves problèmes parce qu'ils estimeront soit qu'on les a trompés en les empêchant de voir l'un des parents, soit que personne n'a vraiment fait d'enquête pour savoir pourquoi il en avait été décidé ainsi, alors qu'il s'agit peut-être d'un cas de violence ou quelque chose du genre.

Puisque nous avons examiné des solutions axées sur les enfants, je crois que nous devons avoir l'assurance de nos ministres que l'on se battra pour obtenir les ressources nécessaires pour faire les choses comme il faut.

La coprésidente (Le sénateur Pearson): Est-ce une question ou un commentaire?

Mme Bennett: Ce n'est pas une question, mais... après tout, oui, c'est une question; avons-nous cette assurance?

Mme Blondin-Andrew: J'aimerais croire que tout ce que nous faisons dans ce dossier plutôt complexe et difficile sert à réduire au minimum les effets négatifs sur les enfants. Ce serait formidable de trouver des solutions et non pas des mesures provisoires, mais les choses ne sont pas simples. Le divorce et la séparation, et la dissolution de la famille est en fait parfois la dissolution de l'idée que l'enfant a du monde et de son monde tout court. C'est une affaire très complexe.

Pour que la situation soit plus vivable, plus acceptable pour les — et je pense que c'est notre objectif — s'il faut des ressources pour informer les gens, je crois que l'important est d'intervenir très tôt. Si vous êtes un meilleur parent, un meilleur éducateur, et si vous avez les moyens d'être un bon parent, je pense que vous saurez quel genre de priorité il faut donner aux enfants dans de telles circonstances.

Mme Bennett: Je crois que ce que je veux dire, c'est qu'un des problèmes qui se posent lorsqu'on veut recommander de changer la loi sur le divorce, c'est que cela devient une affaire qui concerne la justice, car tout commence lorsque les gens ont besoin des tribunaux. Ceux d'entre nous qui avons passé beaucoup de temps dans ce domaine pensons que ce système accusatoire ne fonctionne pas, et qu'il s'agit en fait d'une question de société et pas vraiment d'une question de justice. Mais je ne crois pas que nous réussirons à obtenir un système moins accusatoire, à moins de mettre en place un processus de médiation et une structure sociale ou un dispositif de sécurité dans notre société, qui indiquent aux gens que l'intervention des tribunaux est vraiment le dernier recours, et rarement dans l'intérêt de l'enfant.

Mme Blondin-Andrew: Peut-être pourrais-je terminer ce que j'avais commencé à dire. Les ressources que nous investissons pour aider les parents à mieux assumer leur rôle de parents servent à cette fin — comprendre la situation vécue par ce ou ces enfants, et faire les meilleurs choix possible dans des circonstances déjà fort complexes et difficiles.

I don't think there is a magic solution. I don't think there's going to be a wonderful result with no downsides. This is a messy business when you get into separation and divorce. Let's face it, there's an upside and a downside to many of the circumstances we deal with, and much of this is downside stuff. It's difficult on families, it's difficult on parents, and it's mostly difficult on the children.

I think what we have to do is minimize the impact and try to work as best as possible to create conditions so that children don't suffer the emotional and psychological scars that many of these circumstances leave and that go into adulthood, carried on for years.

Ms Bennett: Secretary of State is a really interesting job. I think it's one of the best, because it gets the idea to knock together all the ministries to be able to find horizontal solutions for these problems. I guess I would hope that even though this sort of falls to the justice minister, there will be an ability for our government to be able to find a horizontal solution that will cross over all of the ministries, and our secretaries of state, who will be looking out for the women and the children and the youth and the future parents and the boys who will be dads one day and all of that, will take a holistic approach.

Ms Fry: I want to support Ethel, and Ethel's concept of primary prevention. As a family practitioner, you know that primary prevention, such as good parenting skills learned at the school level, is key to anything. So I don't think it's only horizontally across governments we're going to find answers but it's also vertically, between different levels of government and different jurisdictions that we would find the answer.

How do we create good parents when 75 per cent of Canadian children live with their two biological parents in the home and only one-third of Canadian children are getting good, positive parenting skills? It tells you that there's a whole chunk of parents who are living together with their kids who still don't know how to do good parenting and how to be consistent and give the child that continuity and that safe environment in a consistent way.

So I think Ethel's answer is clear, that we have to be careful that we don't always look for legislative answers to everything. Legislation alone is not a magic bullet. It doesn't resolve — and legislation quite often can create greater unnecessary imbalances, especially when you're talking about very individual, difficult, complex family situations.

There is a need to be flexible for education, for primary prevention, and all of those other areas, and that crosses all levels of government and jurisdictions.

Ms Blondin-Andrew: I'd like to add something.

The Joint Chairman (Senator Pearson): Okay.

Ms Blondin-Andrew: There are two things we're doing that I think are rather groundbreaking.

Je ne crois pas qu'il existe une solution miracle. Je ne crois pas que nous allons obtenir des résultats merveilleux qui n'aient pas d'inconvénients. C'est une vilaine affaire lorsqu'on en arrive à une séparation ou un divorce. Soyons honnêtes, il y a des aspects positifs et négatifs dans bien des situations, mais dans ce cas particulier, il y a surtout des aspects négatifs. La situation est difficile pour les familles, elle est difficile pour les parents et elle est surtout difficile pour les enfants.

Je pense que nous devons réduire au minimum les effets et nous efforcer de créer les conditions nécessaires pour que les enfants ne gardent pas les séquelles morales et psychologiques que ces situations entraînent souvent et qui peuvent durer longtemps après qu'ils scient devenus adultes.

Mme Bennett: Secrétaire d'État est un poste vraiment intéressant. Je crois que c'est l'un des meilleurs, car on peut solliciter tous les ministères pour trouver des solutions horizontales à ces problèmes. J'espère que même si ce dossier relève davantage du ministre de la Justice, notre gouvernement pourra trouver une solution horizontale qui englobera tous les ministères, et nos secrétaires d'État, et qui s'appliquera à toutes les femmes et les enfants et les adolescents et les futurs parents et les garçons qui seront un jour des pères, et tout cela, dans le cadre d'une approche globale.

Mme Fry: J'aimerais appuyer Ethel et son concept de prévention primaire. En tant que médecin de famille, j'ai appris que la prévention primaire, à savoir l'art d'être un bon parent que l'on apprend dès l'école, est la clé. Je ne crois donc pas que nous allons trouver les solutions horizontalement uniquement, en faisant appel à l'ensemble du gouvernement, mais également verticalement, en faisant intervenir les divers niveaux de gouvernement et les diverses juridictions.

Comment pouvons-nous former de bons parents lorsque 75 p. 100 des enfants canadiens vivent sous le même toit que leurs deux parents biologiques, mais que seulement un tiers des enfants canadiens reçoivent une bonne éducation? Cela indique qu'une bonne proportion des parents qui vivent ensemble, avec leurs enfants, ne savent toujours pas comment être de bons parents, comment être cohérents et donner à leurs enfants la continuité et l'environnement sûr dont ils ont besoin, de façon cohérente.

La réponse d'Ethel est claire. Nous devons veiller à ne pas toujours chercher à tout régler par la législation. La législation seule n'est pas une solution magique. Elle ne résout pas tout... et elle accroît souvent inutilement les déséquilibres, surtout lorsqu'il s'agit de situations familiales particulières, difficiles et complexes.

Il faut être ouverts à l'information, à la prévention primaire, et à tous ces autres éléments, et ces mesures recouvrent tous les niveaux de gouvernement et toutes les juridictions.

Mme Blondin-Andrew: J'aimerais ajouter quelque chose.

La coprésidente (Le sénateur Pearson): D'accord.

Mme Blondin-Andrew: Nous faisons deux choses qui, je pense, sont plutôt innovatrices.

First, we're building a national children's agenda. I don't know if the discussions such as these should escape that process.

We're also looking at a centre of excellence on the well-being of children. I think this would be a very integral part of that discussion in building that particular mechanism for children, for the well-being of our children in this country.

Ms Bennett:

[Inaudible: Editor]

The Joint Chairman (Senator Pearson): Dr. Bennett, please; it's Mr. Mancini's turn.

Ms Bennett: — of the children who were asked to have a lawyer in Ontario and didn't get one.

The Joint Chairman (Mr. Gallaway): You can't answer that.

Mr. Peter Mancini (Sydney—Victoria, NDP): I'll start by making two points.

First of all, I don't feel emasculated that Deborah didn't notice me

Ms Grey: I did notice you. Mr. Mancini: Oh, good.

Ms Grey: I counted four men around the circle.

Mr. Mancini: I haven't been noticed before, so-

Ms Grey: You done good.

Mr. Mancini: Secondly, I want to thank you for coming before the committee. I think many of the issues you've raised are issues we have had to grapple with. I found your remarks interesting. We should sit down over dinner sometime, and with your extra salaries as secretaries of state, you could pay.

Voices: Oh, oh!

Mr. Mancini: I want to pick up on a point that Senator DeWare perhaps left on, because I think it's interesting that in both presentations — and I think this may be a cultural point — you talked about the extended family.

I've worked in the family law area. I've represented many native people in child protection cases, and I understand the role played by the extended family. Sometimes provincial legislation has not recognized that.

At the same time, there have been arguments put before the committee that grandparents and perhaps extended family members ought to have standing in the courts in divorce matters, in terms of custody and access to children. I think there may be two different sides here.

I can see support for it on one hand, and on the other, there have been some comments made that we don't need to heighten tensions. I wonder if I could get your feelings on whether adding parties who have standing to the courts may increase the tension and the possibility of litigation. If the answer is yes, ought there to be some cultural sensitivity on that issue? Or is the answer no?

Premièrement, nous établissons un programme national pour les enfants. Je ne sais pas si des discussions comme celle-ci devraient échapper à ce processus.

Nous envisageons également un centre d'excellence pour le bien-être des enfants. Je pense que cela serait très lié à cette discussion, l'établissement de ce mécanisme à l'intention des enfants, pour le bien-être des enfants de ce pays.

Mme Bennett:

[Note de la rédaction: Inaudible]

La coprésidente (Le sénateur Pearson): Madame Bennett, s'il vous plaît. C'est au tour de M. Mancini.

Mme Bennett: ... des enfants à qui on a demandé d'avoir un avocat en Ontario et qui n'en ont pas obtenu.

Le coprésident (M. Gallaway): Vous ne pouvez pas répondre à cela.

Mr. Peter Mancini (Sydney—Victoria, NPD): Jo commencerai par deux choses.

Premièrement, je ne me sens pas émasculé parce que Deborah ne m'a pas remarqué...

Mme Grey: Je vous ai remarqué.

Mr. Mancini: Ah, tant mieux.

Mme Grey: J'ai compté quatre hommes autour du cercle.

Mr. Mancini: Je n'ai pas été remarqué avant, c'est pourquoi...

Mme Grey: Vous vous en êtes bien tiré.

Mr. Mancini: Deuxièmement, j'aimerais vous remercier de comparaître devant le comité. Je pense que bon nombre des questions que vous avez soulevées sont des questions auxquelles nous avons dû nous attaquer. J'ai trouvé vos remarques intéressantes. Nous devrions dîner un jour, et avec vos salaires supplémentaires de secrétaires d'État, vous pourrez payer.

Des voix: Oh, oh!

Mr. Mancini: J'aimerais revenir sur un point que le sénateur DeWare n'a pas poursuivi, car je pense qu'il est intéressant que dans les deux exposés — et je pense que c'est peut- être un aspect culturel— vous avez parlé de famille élargie.

J'ai travaillé dans le domaine du droit de la famille. J'ai représenté de nombreux autochtones dans des cas de protection de l'enfance et je comprends le rôle joué par la famille élargie. La législation provinciale n'en tient pas toujours compte.

Parallèlement, on a fait valoir devant le comité que les grands-parents et peut-être même des membres de la famille élargie devraient avoir leur place dans les tribunaux en ce qui concerne les divorces, la garde et le droit de visite. Je pense que l'on peut voir là deux points de vue.

D'un côté, il y a des gens en faveur de cette idée, mais j'ai aussi entendu des gens dire qu'il ne faut pas aggraver les tensions. Je me demande ce que vous pensez de l'idée de faire comparaître d'autres parties devant les tribunaux et si cela aggraverait les tensions et les possibilités de litige. Si la réponse est oui, devrait-on tenir compte des sensibilités culturelles? Ou la réponse est-elle non?

That's my first question.

Ms Fry: Ethel, do you want to take it?

Mr. Mancini: Or do you want to go for dinner?

Voices: Oh, oh!

Ms Fry: We can go for dinner, if you'll pay.

Coming out of, again, my experience as a family practitioner, having dealt with a lot of cases like this, I think it would exacerbate the conflict. The questions you would have to ask yourself are, first, what would happen if there was only one grandparent on one parental side? Does that give that particular parent a greater right? Does that give that parent a better family? Children have enough of a hard time sharing themselves between two families than having to share themselves between three and four families. To have grandparents joining in the fray and picking sides, etc., creates even greater confusion, greater conflict and animosity.

If grandparents can stay out of the fray, it might actually give the children sort of a haven and a safe place, occasionally, to feel that there are some people who are above it all and who don't side with anybody else.

I just don't think we should encourage any other people than the parents right now to become involved in this issue, while still saying that the parents shouldn't have complete rights to say they have a right to have this child, because this child is theirs. It should be the child's right that is foremost.

If the child's right is foremost, and it's looked at always in the best interests of the child, then minimizing conflict of any kind is very important.

Ms Blondin-Andrew: I can't claim to be a legal expert on this issue in terms of any party's standing in court on this particular issue, but I can tell you that from a cultural perspective and from an aboriginal perspective, the extended family is extremely important. It's not what it used to be, though. The circumstances of aboriginal people have changed greatly, and so has that role been diminished. There have been many negative impacts because of that, because the support is perhaps not there when it's needed.

In the circumstances, I would agree that it's something I have a bit of hesitation on legislating. Enforcement is such a nasty issue when it comes to divorce and separation. Already we have law upon law, and review upon review, and enforcement issues that are piling one upon the other, and still the results are not what we'd like them to be. In the end, the losers appear to be the children.

In this circumstance, I would say that, from my cultural perspective — and I can speak only from my own frame of reference — it's something you do with cooperation, mutual understanding, with a great deal of affection and a great deal of respect for other people. It's not something I would think that aboriginal people in particular would want to see legislated. But I can't speak for all aboriginal people, because their circumstances are different.

C'est ma première question.

Mme Fry: Ethel, voulez-vous répondre?
Mr. Mancini: Ou voulez-vous aller dîner?

Des voix: Oh, oh!

Mme Fry: Oui, nous pouvons aller dîner si vous pavez.

Encore une fois, d'après mon expérience de généraliste, ayant connu beaucoup de cas de ce genre, je pense que cela exacerberait les conflits. Les questions qu'il faut se poser d'abord sont les suivantes: qu'arriverait-il s'il n'y avait qu'un grand-parent du côté de l'un des parents? Cela donne-t-il à ce parent un droit plus grand? Cela donne-t-il au parent une meilleure famille? Les enfants ont suffisamment de difficultés à se partager entre deux familles sans que nous leur demandions d'avoir à se partager entre trois et quatre familles. Le fait que les grands-parents se joignent au débat et prennent parti, et cetera. crée une plus grande confusion et envenime les conflits et l'animosité.

En restant à l'écart, les grands-parents peuvent en fait donner aux enfants une sorte de havre de paix, de temps à autres, où ils voient des gens qui sont au-dessus de la mêlée et qui ne prennent pas parti.

Je ne pense pas que nous devons encourager d'autres personnes que les parents à intervenir, tout en disant que les parents ne doivent pas être vraiment en mesure de dire qu'ils ont le droit d'avoir cet enfant parce que cet enfant est à eux. C'est le droit de l'enfant qui doit compter avant tout.

Si le droit de l'enfant est prioritaire, toujours dans la perspective du bien de l'enfant, il devient très important de réduire au minimum les conflits.

Mme Blondin-Andrew: Je ne prétends pas être une experte juridique pour dire qui peut être présent au tribunal sur cette question, mais je peux vous dire que d'un point de vue culturel et d'un point de vue autochtone, la famille élargie est extrêmement importante. Mais elle n'est plus ce qu'elle était. Les conditions des peuples autochtones ayant beaucoup changé, ce rôle a diminué, ce qui a entraîné des effets négatifs car ce soutien n'est peut- être plus là lorsqu'il est nécessaire.

Dans ces conditions, j'hésiterais également à légiférer. L'exécution de la loi est une question tellement délicate lorsqu'on parle de divorce et de séparation. Nous avons déjà loi sur loi et examen sur examen et des questions d'exécution de la loi qui s'accumulent les unes sur les autres alors que les résultats ne sont pas à la hauteur de nos attentes. Finalement, ce sont les enfants qui semblent être les perdants.

Dans ces conditions, je dirais que dans ma perspective culturelle — et je ne peux parler que d'après mon cadre de référence — c'est une question de coopération, de compréhension mutuelle, de beaucoup d'affection et de beaucoup de respect pour les autres. Je ne pense pas que les peuples autochtones en particulier aimeraient que l'on légifère là-dessus. Mais je ne peux pas parler au nom de tous les autochtones car ils ne vivent pas tous dans les mêmes conditions.

Grandparents play an absolutely necessary role. It would be interesting to find out how many grandparents are raising their children and grandchildren on their pension, and what a huge and onerous task that is. That's a completely different set of circumstances.

I can't speak to the general population, because I honestly don't have the expertise to do that, but my experience tells me that in the aboriginal community, even in and out of divorce and separation cases and family breakdown, with grandparents and other extended relatives it's a very close-knit community. It's very hard to separate yourself from those.

I think it's even more difficult, because children are the centrepiece of our communities and of the families. So it's very hard to detach and to cut those binds that bring families together.

The Joint Chairman (Senator Pearson): Mr. Mancini, can you leave the next question for the second round? Many people want to ask questions.

[Translation]

Ms Caroline St-Hilaire (Longueuil, BQ): First of all, I would like to thank the two secretaries of State here with us today. Of course, it would have been nice to hear the opinion of the Sollicitor General, but I suppose he's very busy.

I have two comments that I would like to start off with. Ms Fry, you said that, in listening to men and women, you had the impression that men's interests were often played off against those of women. I agree with you that we have to look out for the interests of children before those of men, women or parents.

Ms Fry, you're the Secretary of State for the Status of Women. You've talked a lot about the interests of children, which is all well and good, but I would rather hear what you have to say about the status of women.

There has been a lot of talk, in this committee, about false accusations, family violence, about the fact that custody is often given to the mother rather than to the father. So, I would to hear what women think about this whole situation.

[English]

Ms Fry: Once we break it down into what men are saying, what women are saying, what custodial parents are saying, what non-custodial parents are saying, what fathers are saying, and what mothers are saying, then we get back to this concept of which one of the parents has the right. If we look at what is in the best interests of the child, no child should be forced to live with an abusive parent. If we keep that as a neutral set of values, and then you take that and transpose it on information you may have about who tends to be the most abused of the couple in a marriage, then you may find that you might in some instances come up with an answer to your question.

What I'm suggesting is that we stop looking at it from that issue. Let us say that we look for the child not being forced to live with an abusive parent.

Les grands-parents jouent un rôle absolument nécessaire. Il serait intéressant de savoir combien de grands-parents élèvent leurs enfants et leurs petits-enfants avec leur pension et quelle tâche énorme et lourde cela représente. Ce sont là des conditions complètement différentes.

Je ne peux pas parler pour la population en général, car je n'ai vraiment pas l'expertise pour le faire, mais mon expérience me dit que chez les autochtones, même dans les cas de divorce et de séparation et de rupture familiale, les grands-parents et les autres membres de la famille élargie constituent un groupe très uni. Il est très difficile de les séparer.

Je pense que c'est encore plus difficile du fait que les enfants sont au centre de nos communautés et de nos familles. Il est donc très difficile de se détacher et de couper ces liens qui réunissent les familles.

La coprésidente (Le sénateur Pearson): Monsieur Mancini, pouvez-vous laisser la question suivante pour la deuxième série? Beaucoup de gens veulent poser des questions.

[Français]

Mme Caroline St-Hilaire (Longueuil, BQ): Tout d'abord, je remercie les deux secrétaires d'État d'être parmi nous aujourd'hui. Bien entendu, il aurait été agréable d'entendre l'opinion du solliciteur général, mais j'imagine qu'il est très occupé.

J'aurais deux commentaires à faire tout d'abord. Au début, madame Fry, vous avez dit qu'en entendant les hommes et les femmes, vous aviez eu l'impression que c'était souvent l'intérêt des hommes qui se jouait contre celui des femmes. Je suis d'accord avec vous qu'il faut d'abord voir aux intérêts des enfants avant de voir à ceux des hommes, des femmes ou des parents.

Madame Fry, vous êtes secrétaire d'État à la Situation des femmes. Vous avez beaucoup parlé de l'intérêt des enfants, ce qui est très bien, mais j'aurais davantage le goût de vous entendre parler de la situation des femmes.

Il a beaucoup été question, devant ce comité, de fausses accusations, de violence familiale, du fait que la garde était souvent accordée à la mère plutôt qu'au père. J'aimerais vous entendre nous dire ce qu'éprouvent les femmes par rapport à toute cette situation.

[Traduction]

Mme Fry: Une fois que l'on ramène la question à ce que disent les hommes, les femmes, les conjoints ayant la garde, les conjoints n'ayant pas la garde, les pères et les mères, on en revient à cette idée de savoir lequel des parents a le droit de garde. Si l'on tient compte de l'intérêt de l'enfant, aucun enfant ne devrait être obligé de vivre avec un parent qui le maltraite. Si l'on considère tous ces éléments comme un ensemble neutre de valeurs que l'on associe à l'information sur celui des deux conjoints qui tend à être le plus maltraité dans le couple, vous pouvez alors, dans certains cas, avoir une réponse à votre question.

Je propose simplement que nous cessions d'envisager cette question sous cet angle. Disons que nous voulons que l'enfant ne soit pas obligé de vivre avec un parent abusif.

We talked about power imbalances earlier on. We know that in many instances women tend to be the poorest and have the least resources to be able to go and have legal aid and to bring their cases forward. We have to ensure that we level that playing field so that resources are available to whichever set of parents don't have the best resources, to get to the truth and to get to the best interests of the child.

If we stick to the fact of what, in the case of conflict between two parents, is in the best interests of the child, we will nearly always find that we will make the right decisions. You can transpose that on what you know to be statistics, or what the reality of the cases are. Courts should be judged by the individual cases they have in front of them.

[Translation]

Ms St-Hilaire: One last little question. In your presentation, you talked about children's interests. I would like to ask you if, when all is said and done, you're suggesting that the Divorce Act be changed. As you know, the Divorce Act is federal and the administration of justice is provincial, just as the family and social services are. I would like to know then if you are thinking of amending the Divorce Act and, if so, how do you propose to do that without interfering at the provincial level.

[English]

Ms Fry: Well, I think you're talking about the custody and access component here. That's what you're discussing. We've already talked about not tying issues of maintenance and divorce and the ability for child maintenance into custody and access. I don't think those should be tied.

If we look at the child as the focus, and the centre, the child has a right to have care. That care is economic, physical, mental, emotional and all of those aspects of care. That is the right of the child. The child should be supported by whichever parent has the ability to support that child, and both parents, if they can, should be contributing. In many instances, again, if you look statistically, nearly always the mother is the one who is at the lowest economic level. So the care of the child should be foremost. Again, economic support for the child is key.

Custody and access should be separated from that. I think that's what we're trying to suggest, that you should never tie those two things in. Otherwise, you're saying, "Because I pay for the care of my child, I must see my child." It again goes back to what are parental rights.

Let us focus on the child as being the centre of it all — the child's need for care, for safety, for continuity, to be free from an abusive situation, the child's need to have a solid home base where the child can always feel it belongs.

Again, we find that in most instances, if we look at the parent who is mostly responsible for that child's nurturing, that child's continuity of care, for doing all of the things for the child, quite often that parent may be the one who can provide that environment for the child.

Senator Anne C. Cools (Toronto Centre, Lib.): I'd like to welcome our secretaries of state to this committee, and to thank them for taking the time to come. I have a couple of questions.

Nous avons parlé des déséquilibres de pouvoir. Nous savons que dans bien des cas, les femmes ont tendance à être les plus pauvres et à avoir le moins de ressources pour bénéficier de l'aide juridique et faire avancer leur cause. Nous devons faire en sorte d'avoir des règles du jeu équitables afin que le conjoint qui ne dispose pas des ressources nécessaires puisse bénéficier d'une aide pour faire ressortir la vérité dans l'intérêt de l'enfant.

Si, dans le cas d'un conflit entre les deux parents, on s'en tient à l'intérêt de l'enfant, on constatera presque toujours que l'on prend la bonne décision. Cela peut être transposé sur le plan des statistiques ou de la réalité des cas. Les tribunaux doivent être jugés en fonction les cas particuliers qu'ils doivent trancher.

[Français]

Mme St-Hilaire: Une dernière petite question. Dans votre présentation, vous parlez de l'intérêt des enfants. J'ai envie de vous demander si, finalement, vous suggérez de modifier la Loi sur le divorce. On sait que la Loi sur le divorce est fédérale et que l'administration de la justice relève du provincial, tout comme la famille ainsi que les services sociaux. J'aimerais donc savoir si vous pensez à modifier la Loi sur le divorce et, si oui, comment vous pensez le faire sans ingérence au niveau provincial.

[Traduction]

Mme Fry: Je pense que vous parlez de l'aspect garde et droit de visite. C'est ce que vous voulez dire. Nous avons déjà dit qu'il ne faut pas lier les questions de pension alimentaire et de divorce et la capacité d'élever l'enfant avec la garde et le droit de visite. Je ne pense pas que l'on doit lier les deux.

Si l'enfant est le principal intéressé, il a le droit d'être pris en charge. Cette prise en charge est économique, physique, mentale, émotionnelle et concerne tous les autres aspects. C'est le droit de l'enfant. L'enfant doit être soutenu par le parent qui a la capacité de le faire, et les deux parents, s'ils le peuvent, doivent contribuer. Mais dans bien des cas, d'après les statistiques, c'est presque toujours la mère qui se retrouve dans la pire situation économique. C'est donc l'entretien de l'enfant qui doit être prioritaire. Encore une fois, le soutien économique de l'enfant est essentiel.

Il faut séparer de cela la garde et le droit de visite. C'est ce que nous essayons de suggérer: il ne faut jamais lier ces deux aspects. Sinon, le parent peut dire que puisqu'il paie pour que l'on s'occupe de son enfant, il a le droit de le voir. On en revient à nouveau aux droits parentaux.

Concentrons-nous sur l'enfant — les besoins de cet enfant en matière de soins, de sécurité, de continuité, d'absence de maltraitance, le besoin de l'enfant d'avoir un foyer solide dans lequel il se sentira toujours chez lui.

Nous constatons que dans la plupart des cas, le parent qui exerce la plus grande responsabilité à l'égard de l'éducation de l'enfant, de la continuité des soins et de tout ce qu'il faut faire pour l'enfant, est souvent celui qui peut offrir cet environnement.

Le sénateur Anne C. Cools (Toronto-Centre, Lib.): J'aimerais accueillir nos secrétaires d'État à ce comité et les remercier d'avoir pris le temps de venir. J'aurais deux questions.

How much time do we have?

The Joint Chairman (Mr. Gallaway): About five minutes. Senator Cools: Thank you.

Dr. Fry, you articulated some of the needs of children. You talked about financial needs and you talked about security and so on and so forth. I believe I spotted one that was very visibly absent, which I would articulate as the need of children for two parents. I wonder if you could comment on that.

When you do comment on it, I wonder if you could comment on it in the context of the Liberal Party of Canada's position on the needs of children within custody and access.

I am the senior member of this Liberal caucus, as we sit in this committee, and the Liberal Party of Canada had a very strong position on these issues. I'm very curious as to how Dr. Fry got from that position to the position she articulated today.

Ms Fry: I am not here to speak for the Liberal Party of Canada, I'm here to speak as Secretary of State for the Status of Women. I would like to speak to that. I would like to speak not only based on my position as Secretary of State but also from my own experience as a family physician for 23 years.

The child being at the centre, or the concept of best interests of the child, is supported by this government. We're talking about a children's agenda, and have moved forward to look at issues for the financial security of the child, for the safety of the child from violence, etc.

Senator Cools: My point, Mr. Chairman, was a very narrow point. I was asking for an opinion on the need of children for two parents.

The Joint Chairman (Mr. Gallaway): Okay.

Go ahead.

Ms Fry: I think children need to be brought up in a loving, supportive, and nurturing environment. That environment can be whomever are those people who care, love, and will give that child safety — physically, emotionally, and mentally — security and continuity of care.

Senator Cools: But I was asking about your position, as Secretary of State for the Status of Women, on the needs of children for their two parents.

Ms Fry: And I think I gave you the answer, Senator Cools. I said that children need to be brought up in environments and by persons who will give them love, security, and stability — mentally, physically, emotionally and economically — in every way. Those people can be anyone who will give the child that.

In some cases, it may not necessarily be either parent, or both parents, or any parents.

Senator Cools: I'd like to draw the attention of this committee to a document, called Divorce Law in Canada, produced by Mark MacGuigan. As you know, Mark MacGuigan, then Minister Combien de temps avons-nous?

Le coprésident (M. Gallaway): Environ cinq minutes.

Le sénateur Cools: Merci.

Madame Fry, vous avez parlé de certains besoins des enfants. Vous avez parlé des besoins financiers, de la sécurité et ainsi de suite. Il me semble que vous avez fait un grave oubli. Vous n'avez pas parlé du besoin des enfants d'avoir deux parents. Je me demande si vous pourriez nous faire part de vos réflexions à ce sujet.

Ce faisant, j'aimerais savoir si vous pourriez parler dans le contexte de la position du Parti libéral du Canada sur les besoins des enfants en matière de garde et de droit de visite.

Je suis la doyenne de ce caucus libéral au sein de ce comité, et le Parti libéral du Canada a une position très ferme sur ces questions. Je suis très curieuse de savoir comment Mme Fry est passée de cette position à celle qu'elle a présentée aujourd'hui.

Mme Fry: Je ne suis pas ici pour parler au nom du Parti libéral du Canada, mais à titre de secrétaire d'État à la situation de la femme. C'est dans ce contexte que j'aimerais m'exprimer. J'aimerais parler non seulement en tant que secrétaire d'État mais également d'après ma propre expérience de médecin de famille pendant 23 ans.

Le gouvernement actuel soutient l'idée d'accorder la place principale à l'enfant ou à l'idée du bien de l'enfant. Nous parlons d'un programme pour les enfants et nous en sommes à étudier les questions de sécurité financière, de sécurité financière pour l'enfant, de protection contre la violence, et cetera.

Le sénateur Cools: Monsieur le président, ma question était très précise. Je demandais une opinion sur la nécessité pour un enfant d'avoir deux parents.

Le coprésident (M. Gallaway): D'accord.

Allez-y.

Mme Fry: Je pense que les enfants ont besoin d'être élevés dans un milieu où on les aime, où on les soutient et où l'on prend soin d'eux. Cet environnement peut être assuré par tous ceux qui apportent ces soins, cet amour et assurent la sécurité de l'enfant — physiquement, émotionnellement et mentalement — la sécurité et la continuité des soins.

Le sénateur Cools: Mais je vous demandais votre position, en qualité de secrétaire d'État à la Situation de la femme, au sujet du besoin de l'enfant d'avoir deux parents.

Mme Fry: Et je pense vous avoir donné la réponse, sénatrice Cools. J'ai dit que les enfants ont besoin d'être élevés dans des milieux et par des personnes qui leur apporteront amour, sécurité et stabilité — sur le plan mental, physique, émotionnel et économique — de toutes les façons. Ce peut être n'importe quelle personne susceptible de pouvoir le faire.

Dans certains cas, cela ne sera pas nécessairement l'un ou l'autre parent, ni les deux parents ni aucun parent.

Le sénateur Cools: J'aimerais attirer l'attention du comité sur un document intitulé: Le droit du divorce au Canada produit par Mark MacGuigan. Comme vous le savez, Mark MacGuigan, alors of Justice, conducted, to his mind and to my mind at the time, an extremely extensive and exhaustive overhaul of the divorce law, which he tabled in the House of Commons as Bill C-10.

For the consideration of this committee, and because many of us knew MacGuigan and were close to this work, in this document there is a section called "The Rights of Children." Page 22 reads:

Given the impact a divorce has on the interests and welfare of a child, divorce law should ensure that the rights of children are protected.

1) Where feasible, a child should have maximum access to both parents.

Item 3 reads:

In making such decisions, the court should consider the best interests of the child, particularly the child's interest in having maximum access to both parents.

This was the position of the Liberal Party of Canada and the Liberal caucus in 1984, 1985 and 1986. Having said that, I wonder if Dr. Fry can tell us what the term "best interests of the child" means, and what its origins are, as a legal doctrine.

Ms Fry: I think the term "best interests of the child" means what will provide the child with a stable, nurturing, loving environment that will provide for the child's emotional, mental, physical, and economic needs. That is what I think is the best interests of the child.

It is difficult to look at the best interests of the child today, when we look at the changing demographics of Canada, and compare it with the best interests of the child 20, 25, 30, 40 years ago.

To me, the term "best interests of the child" is pretty clear. It is what will give the child those things that are essential for the needs of the child to grow up to be strong, to be confident, to be free from care and to feel that this child can be a contributing member of society, a good citizen with self-esteem.

Senator Cools: I'd like to make the point that "best interests of the child" has a peculiar and a particular historical origin, one that this committee has, as of yet, not addressed. I just put that out. It was that concept that Mark MacGuigan was driving at when he introduced the term "best interests of the child" into divorce legislation for the first time in this country. I just make that point.

My final point is on the issue of domestic violence. Domestic violence raises its head a lot in this committee. I've been very, very struck that domestic violence, according to the minister, means a different thing to her than what it means to me. And that's quite fine. But what I would like to thank the minister for is for introducing to us here one of the conundrums of the era, and one of the painful and tragic issues that has been put before this committee.

ministre de la Justice, avait réalisé, selon lui et selon moi à l'époque, une étude extrêmement vaste et complète du droit du divorce, qu'il a déposée à la Chambre des communes sous la forme du projet de loi C-10.

À titre d'information pour le comité et du fait que beaucoup d'entre nous connaissions MacGuigan et connaissions bien son travail également, il y a dans ce document un article intitulé: «Les droits des enfants» page 22, qui se lit comme suit:

Considérant les répercussions du divorce sur les intérêts et le bien-être de l'enfant, le droit du divorce devrait assurer la protection des droits des enfants.

1) Dans la mesure du possible, l'enfant devrait avoir la possibilité de voir l'un et l'autre parent aussi librement que possible.

L'article 3 se lit comme suit:

En prenant cette décision, le tribunal devrait tenir compte du bien de l'enfant, particulièrement de sont droit à un accès aussi libre que possible aux deux parents.

C'était la position du Parti libéral du Canada et du caucus libéral en 1984, 1985 et 1986. Ceci dit, je me demande si le Dr Fry pourrait nous dire ce que les mots «bien de l'enfant» signifient, et quelles en sont les origines sur le plan juridique.

Mme Fry: Je pense que par «bien de l'enfant», on entend tout ce qui assurera à l'enfant un environnement stable, nourricier et aimant qui répondra aux besoins émotionnels, mentaux, physiques et économiques de l'enfant. C'est, selon moi, ce que veut dire le bien de l'enfant.

Il est difficile de comparer le bien de l'enfant d'aujourd'hui, compte tenu de la nouvelle démographie du Canada, avec le bien de l'enfant il y a 20, 25, 30 ou 40 ans.

Pour moi, la notion de «bien de l'enfant» est très claire. C'est ce qui donne à l'enfant tout ce qui est essentiel pour répondre à ses besoins afin de devenir fort, d'avoir confiance en lui, d'être libre et de devenir un membre à part entière de la société, un bon citoyen qui a une bonne estime de soi.

Le sénateur Cools: J'aimerais faire remarquer que l'expression «bien de l'enfant» a une origine historique bien particulière que le comité n'a pas encore étudiée. Je voudrais le souligner. C'est ce concept que Mark MacGuigan voulait faire ressortir lorsqu'il a adopté l'expression «le bien de l'enfant» dans la Loi sur le divorce pour la première fois dans ce pays. Je voulais simplement le faire remarquer.

Ma dernière question porte sur la violence familiale. On parle beaucoup de violence familiale dans ce comité. J'ai été particulièrement frappée par le fait que la violence familiale, selon la ministre, n'a pas le même sens pour elle et pour moi. Et c'est très bien. Mais j'aimerais remercier surtout la ministre de nous avoir mentionné ici l'une des grandes énigmes de notre ère et l'une des plus grandes tragédies dont on ait jamais entretenu le comité.

I note that Dr. Fry quoted the Book of Kings, Old Testament, 3:5, and cited Solomon. I'd just like to put the statement she quoted in a greater context.

The wisdom of Solomon, in that instance, as I read the Bible—and I recommend anybody to read it — was that Solomon understood that one of those women had committed an infanticide, which, as we know, traditionally is a woman's crime, as witnessed by section 233 of the Criminal Code. A man cannot be charged with infanticide. Only a woman can be. It traditionally has been a woman's crime. It's a tragic and terrible, terrible thing. If you've ever come close to it, it just puts the fear of God into your heart.

The point of Solomon's wisdom in that instance is that he understood that the woman who had committed an infanticide, and had caused or allowed to happen the death of one child, could very easily allow the death of the other, and that the woman who would be the genuine mother of the child would be interested in rescuing that child, and holding that child to her bosom.

So I thank Dr. Fry for putting out before us the fact of female violence, particularly to children. I know it is a terrible thing, and it frightens all of our hearts, but it is a fact of life. In point of fact, when it comes to child abuse and domestic violence, children are at greater risk from women than they are from men in terms of child abuse.

But the point I make, Dr. Fry, is that the majority of people involved in divorce do not involve themselves in domestic violence. The fact of the matter is, a lot of the statistics that you refer to — and you don't really give us a lot of data. You make a lot of statements: "It is well known —"; "We know that —"; "It is well established that —"; "The overwhelming evidence is —" and so on. There are a lot of those sorts of statements.

But the fact of the matter is, only a small number of the total population involve themselves in domestic violence in any event, and therefore, when we look at considerations of divorce, we should look at general population trends rather than trends in crime or trends in what I would describe as deviance.

The Joint Chairman (Mr. Gallaway): Senator Cools, I'm sorry, but you're a little over time.

Senator Cools: I'll bring it to a conclusion, then.

I think it's very important that there are large numbers of Canadian men and women who are standing ready, willing and able to be good parents to their children if they would get the opportunity, and I don't think it serves public policy very well to suggest that the majority of those, or even many of them, are involved in domestic violence.

Mr. Philip Mayfield (Cariboo—Chilcotin, Ref.): There have been references to a couple of things. One is that legislation is not the only answer, and I would agree with that, but unfortunately, as legislators, that's where we're at, looking at the legislation and the rules that go along with divorce, at least from the federal level.

One of the things that concerns me is that in setting up a process to assist separating couples in resolving their problems to have to an amicable solution, hopefully for the best interests of the child—. And I would also add that in my understanding of best

Je note que le Dr Fry a cité le Livre des rois de l'ancien Testament, 3:5, et en particulier Salomon. J'aimerais placer sa citation dans un contexte plus large.

Dans ce cas, quand j'ai lu la Bible — et je recommande à tous de la lire — la sagesse de Salomon a consisté à comprendre que l'une des femmes avait commis un infanticide qui, comme nous le savons, est un crime traditionnellement féminin, comme en témoigne l'article 233 du Code criminel. Un homme ne peut pas être accusé d'infanticide. Seule une femme peut l'être. C'est traditionnellement un crime de femme. C'est quelque chose de tragique et de terrible. C'est terrifiant, lorsqu'on voit une situation de ce genre de près.

Dans ce cas-là, la sagesse de Salomon a consisté à comprendre que la femme qui avait commis l'infanticide et qui avait provoqué la mort d'un enfant aurait pu facilement permettre la mort de l'autre, et que la femme qui serait la vraie mère de cet enfant youdrait le secourir et le tenir dans ses bras.

Je remercie donc le docteur Fry de nous avoir parlé de la violence familiale, en particulier celle dont les enfants sont victimes. Je sais que c'est une situation terrible et qui nous fait très peur, mais c'est une réalité de la vie. En fait, en matière de violence familiale et de maltraitance des enfants, les enfants ont souvent plus à craindre des femmes que des hommes.

Mais ce que je veux dire, docteur Fry, c'est que la majorité des gens qui divorcent ne sont pas dans une situation de violence familiale. Le fait est qu'une bonne partie des statistiques dont vous parlez... et vous ne nous donnez pas beaucoup de données. Vous dites souvent: «On sait très bien que»; «nous savons que»; «il est un fait établi que»; «tout indiqué que...» et cetera. Vous dites beaucoup ce genre de chose.

Mais le fait est qu'une petite partie seulement de l'ensemble de la population est en situation de violence familiale et, par conséquent, dans le contexte du divorce, nous devons considérer la population en général plutôt que les tendances à la criminalité ou à ce que j'appellerais la déviance.

Le coprésident (M. Gallaway): Madame le sénateur Cools, je suis désolé, mais votre temps est écoulé.

Le sénateur Cools: Je vais conclure, dans ce cas.

Je pense qu'il est très important qu'il existe un grand nombre d'hommes et de femmes canadiens qui sont tout à fait prêts à être de bons parents pour leurs enfants s'ils en ont l'occasion. Je ne crois pas qu'il soit dans l'intérêt de la politique publique de suggérer que la majorité, ou même beaucoup de ces parents, sont dans des situations de violence familiale.

M. Philip Mayfield (Cariboo—Chilcotin, Réf.): On a parlé de plusieurs choses. La première est que la loi n'est pas la seule réponse, ce à quoi je souscris, mais malheureusement, en tant que législateurs, nous devons nous en contenter, nous avons une loi et des règlements sur le divorce, tout au moins au niveau fédéral.

Une des choses qui me préoccupe, c'est qu'au moment d'établir un processus susceptible d'aider les couples qui se séparent à résoudre leurs problèmes de façon amicale, et nous l'espérons dans l'intérêt de l'enfant... Et j'ajouterais également que selon ma interests of the child, if there is one person who does not have a best interests looked after, then the whole unit is going to still be at "dis-ease." I know in families, normal families that are not contemplating separation, that if something has happened or one of the family has done something, it affects the whole family.

I guess the point I'm making in these parentheses is that as I look at best interests of the child, I think we have to look at the best interests of all those who are involved, or there's going to be that sense of uneasiness and lack of settlement that will allow for the best interests of the child.

But I'll get back to the issue I want to deal with. As we look at the system that has been set up, so often we have heard witnesses say that they probably needed some help, but they were certainly doing better before the legal system and some of the professionals got involved.

I listened to my colleague, Deborah Grey, mention the same thing again today.

For example, I listened to one man, who was a lawyer, make a plea to the committee to try to do something to keep shark lawyers from exacerbating a difficult situation.

I listened to a judge here say that affidavits come to him that he knows are a pack of lies but he can't do anything about it, because the information brought before him is beyond his ability to test it.

I heard you, Hedy, say that there are means of dealing with perjury, but in fact in this area of law, it's very difficult to deal with perjury.

What I would like to hear two ministers of the Crown relate to the committee is, do you have any thoughts about how the committee can deal with these kinds of problems that families have, and how we might recommend that the legislation be dealt with to change?

Unfortunately for me, many of the arguments — perhaps all of the arguments — you've brought have been brought to the committee many times before, by many witnesses. At this stage of our deliberations what we're looking for are people who can help us understand the problem in a way that we can make proper and meaningful recommendations about how to deal with these problems.

Ms Fry: I think you've presented the complexities of the issues very well.

There is no magic answer. There is no magic bullet. There is no one-size-fits-all solution. These are individual and very different issues, and individual and very different cases. If in one case there is a false allegation, in another case there may not be a false allegation. So I think we should continue to look at how we have solutions that are flexible.

Legislation has a tendency to give you a one-size-fits-all solution. The question is to find a process by which judges can have the appropriate training, can have the access to resources. Persons coming to the judges must be able to have a level playing field so that one person doesn't have more money to pay a high-priced lawyer when the other person doesn't have anybody. Those are the things we need to look at.

compréhension de ce qu'est l'intérêt de l'enfant, s'il y a une personne dont l'intérêt n'est pas bien servi, toute l'unité sera dans une situation de malaise. Je sais que dans les familles, les familles normales qui n'envisagent pas une séparation, quand quelque chose arrive à un des membres de la famille, cela touche l'ensemble.

Ce que je veux dire dans cette parenthèse, c'est qu'en ce qui concerne l'intérêt de l'enfant, il faut penser à celui de tous ceux qui sont en cause car, sinon, il y aura toujours ce sentiment de malaise et cette absence de stabilité qui ne sont pas dans l'intérêt de l'enfant.

Mais je vais revenir à la question qui m'occupe. Pour ce qui est du système mis en place, nous avons souvent entendu des témoins nous dire qu'ils ont sans doute besoin d'aide, mais qu'ils s'en sortaient mieux avant que le système juridique et certains professionnels n'interviennent.

J'ai écouté ma collègue, Deborah Grey, dire la même chose aujourd'hui.

Par exemple, j'ai entendu un homme, un avocat, demander instamment au comité d'essayer de faire quelque chose pour empêcher les avocats cupides d'exacerber une situation difficile.

J'ai entendu un juge dire ici qu'il reçoit des affidavits dont il sait que ce sont des mensonges, mais qu'il ne peut rien faire car il n'est pas en mesure de vérifier l'information qui lui est remise.

Hedy, je vous ai entendue dire qu'il existe des moyens de punir les faux témoins, mais en réalité, dans ce domaine du droit, il est très difficile de le faire.

J'aimerais entendre les deux ministres de la Couronne dire au comité ce qu'elles estiment qu'il pourrait faire pour régler le genre de problèmes auxquels les familles doivent faire face et comment nous pourrions recommander des modifications à la loi?

Malheureusement pour moi, de nombreux témoins ont déjà fait valoir devant le comité bon nombre des arguments — et peut-être même tous — que vous venez de présenter. À cette étape de nos délibérations, nous voulons que les gens nous aident à comprendre le problème de façon à pouvoir formuler des recommandations appropriées et utiles sur la façon de régler ces problèmes.

Mme Fry: Je pense que vous avez très bien montré la complexité des questions.

Il n'y a pas de réponse magique. Il n'y a pas de solution miracle. Il n'y a pas de panacée. Ce sont des questions individuelles et très différentes et des cas individuels et très différents. Si dans un cas il y a de fausses allégations, dans un autre il peut ne pas y en avoir. Il faut donc rechercher des solutions flexibles.

La loi a tendance à fournir une solution universelle. La question est d'établir un processus permettant aux juges d'obtenir une formation appropriée et d'avoir accès aux ressources. Les personnes qui se présentent devant les juges doivent pouvoir bénéficier de règles du jeu équitables afin que l'une n'ait pas plus d'argent que l'autre pour payer un avocat cher. C'est ce que nous devons étudier.

How do we make sure everyone has equal access, speedy access, to the issues and to the questions that come? And let them be individually tailored to the individual families and to the individual children, because I think that's the only way we would find the answers. We need to look at a process that is very flexible and that is individually centred.

As a family physician, I can tell you that there is no one answer for treatment for any problem that comes to you. You cannot suggest that if you have six families coming to you, and six families have six children, all with the same medical problem, you will treat them all the same way. You can't do that. There are individual issues.

Mr. Mayfield: Is there a means for, say, dealing with a lawyer or a counsellor who takes advantage of that situation to not necessarily help the clients but for their own personal advantage? Is there a way of dealing with that, which was one problem that was brought to the committee?

Is there a way of testing evidence in affidavits that's brought to judges so that a judge can look at this and say, "Well, I know at least this is accurate information," without having to wonder whether it's a pack of lies? Are there ways of dealing with these kinds of technicalities that you'd like to speak to?

Ms Fry: Again, I think if a judge is faced with legal arguments on both sides, stating certain things, then the judge should have the usual recourse of judges to call in expert testimony, to have people look at the issues, to see what they think from a neutral, third-party, professional perspective.

Carolyn said she's heard of a lot of people who don't have the ability to do that. How do we talk about having trained people who have in fact the ability to give that kind of expert testimony? It's how we deal with every court case. Regardless of what the issues are, people come to court and they have one point of view, and the other person's lawyer has another point of view.

How does a judge deal with that, whether it be because somebody said you stole their car, or somebody said you were the one who burned down their house, or whatever the reasons are? The bottom line is that the judge has a series of tools at his or her hands to be able to reach into and say, okay, I need to get medical testimony here; I need to get expert evidence here; I need to get somebody to look at the crime scene and see whether there was arson or not; I need this and I need that to eventually try to make the best decision I can make, given all the information I can from parties other than the two who are fighting with each other.

So I think that's the only way there is, in this world where we have no set, pat answer for any problem, and we have absolutely no way of ensuring that everything that will ever be done will always be right or will always be wrong. I don't think there's a magic answer.

It's to give the judges the tools they have there, to be able to do it and to do it as speedily as possible to counterbalance arguments on both sides.

Ms Blondin-Andrew: In this circumstance — and I beg the indulgence of the committee — you're talking about 5 per cent to 7 per cent high-conflict. The good news is that 95 per cent of

Comment faire pour s'assurer que chacun ait accès de façon équitable et rapide à un processus susceptible de régler les questions qui surviennent et pour que ce processus soit adapté aux familles et aux enfants, car je pense que c'est la seule façon de trouver des réponses. Il faut que le processus soit très souple et individualisé.

À titre de médecin de famille, je peux vous dire qu'il n'y a pas de réponse à tous les problèmes. Si six familles viennent vous voir et que ces six familles ont six enfants, tous avec le même problème médical, vous ne pourrez pas les traiter tous de la même façon. C'est impossible. Ce sont des cas individuels.

M. Mayfield: Y a-t-il un moyen par exemple de confronter un avocat ou un conseiller qui tire avantage de la situation et qui au lieu d'aider les clients agit dans son propre intérêt? Y a-t-il une solution à ce problème, un des problèmes qui a été porté à l'attention du comité?

Y a-t-il un moyen de vérifier l'information figurant dans les affidavits qui sont remis aux juges pour que ceux-ci puissent constater la véracité des faits sans avoir à se demander si tout cela n'est que mensonge? Existe-t-il des moyens de régler ce genre de problème pratique?

Mme Fry: Là encore, je pense que si un juge entend les arguments juridiques des deux côtés, entend certains faits, il doit disposer des recours habituels et pouvoir convoquer un expert, pour faire examiner la situation et leur demander ce qu'ils en pensent d'un point de vue neutre et professionnel.

Carolyn a dit qu'elle avait entendu beaucoup de gens se plaindre qu'ils n'avaient pas cette possibilité. Comment avoir des gens formés qui ont la capacité de donner ce genre de témoignage d'expert? C'est la réalité de toutes les affaires qui passent devant un tribunal. Quelle que soit la question, des gens vont se présenter avec un point de vue et d'autres avec un autre point de vue.

Comment le juge décide-t-il, que ce soit pour une question de vol de voiture ou d'incendie volontaire ou autres. Le fait est que le juge dispose d'une série d'outils pour décider, par exemple, d'obtenir un témoignage médical ou un témoignage d'expert ou pour trouver quelqu'un qui examinera la scène du crime pour savoir s'il y a eu incendie volontaire ou non. Il peut décider ce dont il a besoin pour prendre la meilleure décision possible, compte tenu de toute l'information qu'il peut obtenir des parties autres que les deux qui sont en conflit.

Je pense donc que c'est la seule façon de procéder, dans un monde où nous n'avons pas de réponse toute faite à un problème et que nous n'avons absolument aucun moyen de s'assurer que ce que nous faisons sera toujours bien ou toujours mal. Je ne pense pas qu'il y ait de réponse magique.

Nous devons donner aux juges les outils qui lui permettront d'agir le plus rapidement possible pour contrebalancer les arguments des deux côtés.

Mme Blondin-Andrew: Dans ce cas — et je demande l'indulgence du comité — vous parlez d'environ 5 à 7 p. 100 de conflits graves. La bonne nouvelle est que 95 p. 100 d'entre eux

them are resolvable. How so? Probably by prevention, intervention, mediation, counselling — a whole set of human resources that don't come into play in legislation.

I've been here for 10 years, and I've sat on committees and helped co-author some of the eight reports we've presided over. The committees are masters of their own destiny. Many wonderful recommendations come forward from committees.

The questions you're asking appear to have no set magic solution, or no answer that you can find in any institution or book, or that any committee could probably prescribe from elsewhere. I think you're going to have to encase that innovation that allowed these groups, 95 per cent of this conflict group, to resolve their issues. How did they do that? How did they achieve that?

If you're talking about enforcement here, which is what would end up happening, that, as you see, has not really been a 100 per cent solution. When you have enforcement, you have reviews and changes, as I indicated early on, which haven't worked any better than what probably worked well with the 95 per cent. You're talking about a small percentage here.

I'm not sure there is a magic solution or one answer that will work, because these are unique circumstances, and human nature is at play at its best and its worst under these circumstances.

I would appeal to the committee that you find a way. I mean, you can make any recommendation, any innovative suggestion, that would encase that innovation — mediation, counselling, whatever it is — or even prescribe the kinds of resources that might be needed to do that.

The Joint Chairman (Senator Pearson): I have you down, Mr. Mancini, for the second round.

Senator Erminie J. Cohen (Saint John, PC): I didn't realize, when I was coming to a custody and access meeting, that I was going to hear so many interesting biblical commentaries today. You never know from day to day what's going to occur.

I want to thank both speakers very much for their presentations. You reflect many of the sentiments that I personally feel.

I just want to point out for the record that I think you made a very good point, and one we have to recognize, that very few custody and access disputes reach court. I think when you read the write-ups and you hear the discussions, you feel that practically everybody ends up in court, and yet only 5 per cent to 7 per cent, as you just said, Madam Minister, are high-conflict cases. So I think that really bears repeating.

On appointments to the bench, I'd like to make a personal recommendation that when lawyers are appointed to the bench, we make sure that they have had massive practice in family law. Because there are situations, I know in my province, where judges appointed to family law courts to sit on the bench do not have a family law background. It can cause great havoc. But that's just an aside.

sont résolus. Comment? Probablement par la prévention, l'intervention, la médiation, les conseils — toute une série de ressources humaines qui ne sont pas prévues par la loi.

Je siège à ce comité depuis dix ans et j'ai siégé à d'autres comités et contribué à rédiger certains des huit rapports auxquels nous avons présidé. Les comités sont maîtres de leur propre destinée. Les comités formulent souvent des très bonnes recommandations.

Les questions que vous posez ne semblent pas avoir de solution magique ni de réponse que l'on puisse trouver dans une institution ou un livre ou qu'un comité pourrait prescrire. Je pense qu'il vous faudra concrétiser cette innovation qui a permis à ces groupes, à 95 p. 100 de ce groupe en situation de conflit, de résoudre leurs problèmes. Comment ont-ils fait? Comment ont-ils réussi?

L'application de loi, la solution qui serait privilégiée, n'a pas, comme vous le voyez, été vraiment une solution à 100 p. 100. Lorsque vous appliquez la loi, vous avez des examens et des modifications, comme je l'ai dit plus tôt, qui n'ont pas donné de meilleurs résultats que ce qui a probablement bien marché pour les 95 p. 100. Nous parlons ici d'un très petit pourcentage.

Je ne pense pas qu'il y ait une solution magique ou une réponse qui sera la bonne à chaque fois, car les circonstances sont uniques et la nature humaine est en jeu, dans le pire sens et dans le meilleur.

Je fais appel au comité pour qu'il trouve une solution. Vous pouvez formuler des recommandations, une proposition innovatrice et des moyens de concrétiser cette innovation — médiation, counselling, ou autres — ou même prescrite le genre de ressources nécessaires pour ce faire.

La coprésidente (Le sénateur Pearson): Monsieur Mancini, je vous réserve pour la deuxième série.

Le sénateur Erminie J. Cohen (Saint John, PC): En arrivant à une réunion sur la garde et le droit de visite, je ne me rendais pas compte que j'allais entendre autant de commentaires bibliques intéressants aujourd'hui. On ne sait jamais d'un jour à l'autre ce qui va se produire.

J'aimerais remercier les deux intervenantes de leur présentation. Vous exprimez bon nombre des sentiments que je ressens personnellement.

J'aimerais souligner pour mémoire que vous avez dit quelque chose de très important, dont nous devons tenir compte, à savoir que très peu de cas de garde et de droit de visite passent devant un tribunal. Lorsqu'on les lit les dossiers et que l'on entend les discussions, on a l'impression que tout le monde finit devant un tribunal alors qu'en réalité 5 à 7 p. 100 seulement, comme vous l'avez dit, madame la ministre, sont des cas de conflit grave. Je pense que cela doit être souligné.

J'aimerais faire une recommandation personnelle: lorsque des avocats sont nommés juges, nous devons faire en sorte qu'ils aient une grande expérience du droit familial. Il y a des cas, que je connais dans ma province, où des juges nommés à une cour du droit de la famille n'ont pas d'antécédents dans ce domaine. Cela peut entraîner des catastrophes. Mais c'était là une parenthèse.

I wanted to thank you for your statistics on the spousal abuse area. I've kind of been hoping to hear the breakdown of spousal abuse cases — the 21,900, where 11 per cent are male and 89 per cent are female — because there has been major discussion in our travels. This is the first time I've really had the numbers. I thank you for that, because I think that's important to hear.

I did want you to comment, if you might, on concerns that were expressed from witnesses as to parental alienation — I think you did touch on denied access here — and also on language, either one.

The Honourable Sheila Finestone (Mount Royal, Lib.): Excuse me, Madam Chair, but just as a point of information — and I'm sorry I must leave — I would like to object to the fact that there were seven questions from the other side of the floor and one from this side. I think that's wrong.

Senator Cools: Maybe we should review that. I thought it was first come, first served, as you did it.

The Joint Chairman (Senator Pearson): That's right. We've had two from this side, but we've taken the names as they've come up.

Please go ahead.

Ms Fry: First and foremost-

Sorry, Senator Cohen; I can't remember the questions. One had to do with language. What was the other one?

Senator Cohen: I wanted you to touch on parental alienation, which we heard expressed here with the witnesses; denied access, which you touched upon; and the language.

Ms Fry: The issue of parental alienation, I think, can be dealt with if you look at speedy resolutions to issues of questions of allegations, where the child should not visit with one parent or another. If we resolve that speedily, I think alienation will not have time to occur, and if, during the period of time, you have supervised access, then that could make sure the child is in contact with that particular parent. So I think that could deal with that.

With regard to language, we know that gender, race, ethnicity, etc., tend to create another level of discrimination and denial of access to all kinds of things, so in many cases, language might create some problems in terms of access to justice and access to the court system, etc.

In those instances where you have a parent, one of the two parents or both parents, where one may be better educated than the other, when the other one may not have the linguistic skills or speak another language and not speak English or French very well, then I think the courts would have to look at how they'd find a way to have translators or to find some way to get that information from the person who doesn't speak the language of the court so that person could have access.

J'aimerais vous remercier des statistiques que vous avez présentées sur la violence conjugale. J'aurai aimé obtenir une ventilation des cas de violence conjugale — les 21 900 cas où 11 p. 100 sont des hommes et 89 p. 100 sont des femmes — car nous avons entendu beaucoup de discussions à ce sujet dans nos déplacements. C'est la première fois que j'entendais ces chiffres. Je vous en remercie parce que je crois que c'est important.

J'aimerais que vous nous parliez, si vous le voulez bien, des préoccupations exprimées par certains témoins au sujet de l'aliénation parentale — je pense que vous avez abordé la question du refus du droit de visite ici — ainsi que de la langue; l'une ou l'autre.

L'honorable Sheila Finestone (Mont-Royal, Lib.): Excusez-moi, madame la présidente, mais à titre d'information seulement — et je suis désolée d'avoir à partir — j'aimerais m'opposer au fait qu'il y a eu sept questions de l'autre côté et une seule de ce côté-ci. Je pense que ce n'est pas bien.

Le sénateur Cools: Peut-être devrions-nous revenir là-dessus. Je pensais que c'était premier arrivé, premier servi, comme vous l'avez fait.

La coprésidente (Le sénateur Pearson): C'est exact. Nous avons eu deux questions de ce côté-ci, mais nous avons pris les noms au fur et à mesure.

Allez-y.

Mme Fry: Tout d'abord...

Désolée, madame le sénateur Cohen; je ne me souviens pas des questions. L'une avait trait à la langue. Quelle était l'autre?

Le sénateur Cohen: Je voulais que vous abordiez la question de l'aliénation parentale, dont des témoins nous ont parlé ici; du refus du droit de visite, que vous avez abordé, ainsi que de la langue.

Mme Fry: Je pense que l'on peut régler la question de l'aliénation parentale en résolvant rapidement la question des allégations qui font en sorte qu'un enfant ne doit pas se rendre chez l'un ou l'autre des parents. Si nous résolvons cette question rapidement, je pense que l'aliénation n'aura pas le temps de se développer et si, pendant cette période, on autorise un droit de visite supervisé, on permettra à l'enfant s'être en contact avec ce parent. Je pense que ce serait-là une solution.

En ce qui concerne la langue, nous savons que le sexe, la race, l'ethnicité, et cetera, tendent à créer un autre niveau de discrimination et de refus de droit de visite et toutes sortes d'autres choses. C'est pourquoi dans bien des cas, la langue peut créer des problèmes d'accès à la justice et au système judiciaire, et cetera.

Lorsqu'un parent, un des deux ou les deux, est plus instruit que l'autre, a des compétences linguistiques supérieures ou parle une autre langue et ne parle pas très bien l'anglais ou le français, je pense que les tribunaux doivent demander la présence de traducteurs ou trouver un autre moyen d'obtenir l'information de la personne qui ne parle pas la langue du tribunal afin qu'elle puisse y accéder.

It's all about access. It's all about ensuring that there is a level playing field for access for both parties, whether it be lack of access for economic reasons, whether it be lack of access for linguistic reasons, whether it be lack of access for cultural or racial reasons, or whatever. It's important that we ensure that there is equal access, a level playing field to have access, to the resources needed by both sides.

We've seen that one of the major problems is that one side or the other may have far more economic resources, and the ability to buy, as we've said earlier on, high-priced, powerful lawyers for one person, when the other person has nothing, and no ability to have access, who quite often gives up or who quite often doesn't have very good representation. How do we ensure that there is an ability for good legal aid and for good resource allocation?

The Joint Chairman (Senator Pearson): Is that enough?

Senator Cohen: For now, yes. I want to give the other side a chance.

The Joint Chairman (Senator Pearson): There wasn't actually anyone else from this side asking.

The next person is Mr. Lowther.

Mr. Eric Lowther (Calgary Centre, Ref.): I'd be glad to defer my question to the other side, if there's a question there.

Senator Cools: And I would have been happy to defer too. I mean, senators come last.

Mr. Lowther: Are there any takers on that side? If not, I'll go ahead.

We've heard the positions of the ministers here, and I've found it quite interesting. I was trying to compare it back to the testimonies we heard as we travelled the country, and how it lined up. On some areas I think it did line up pretty well in terms of some of the concerns we heard about violence. We all share those concerns. But there's one area I'm still not quite clear about.

I got the impression, when we went across the country and heard the testimonies, that the theme we heard was that it was in the best interests of the child to have as much as possible a close and continuous relationship with both parents, and that whatever recommendations we make should try, or do everything possible, to strengthen and maintain continuous relationship, as close as possible, with both parents.

I'm not sure I heard that here. What I'm hearing here is that they should be looked after, and cared for by somebody who loves them. That's a nice thing to say, but it's not the same as both parents.

Now, am I not hearing it right, or is that an accurate representation of the difference in position?

Ms Fry: I'm sorry if that's what you heard. That's not at all what I said. I did say that in cases where both parents are seeking to discuss the issue where there's conflict with regard to custody and access, it should always be looked at with regard to the best interests of the child, and not whether one parent has a right or another over the child.

C'est une question d'accès. Il faut assurer des règles du jeu équitables pour les deux parties, que ce soit l'impossibilité d'accéder au système pour des raisons économiques ou pour des raisons linguistiques ou pour des raisons culturelles ou raciales ou autres. Il est important d'assurer cette égalité d'accès, ces règles du jeu équitables pour que les deux parties disposent des ressources nécessaires.

Nous avons vu que l'un des principaux problèmes tient au fait que l'un ou l'autre des conjoints peut disposer de ressources économiques beaucoup plus importantes et est en mesure de faire appel, comme nous l'avons dit tout à l'heure, à des avocats puissants et chers alors que l'autre n'a rien et n'a pas cette possibilité, ce qui le pousse souvent à abandonner ou fait qu'il n'est pas bien représenté. Comment assurer cette capacité à obtenir une aide juridique suffisante et des ressources adéquates?

La coprésidente (Le sénateur Pearson): Est-ce suffisant?

Le sénateur Cohen: Pour le moment, oui. Je veux donner une chance à l'autre côté.

La coprésidente (Le sénateur Pearson): Il n'y a pas d'autres questions de ce côté.

Le prochain est M. Lowther.

Mr. Eric Lowther (Calgary-Centre, Réf.): Je peux très bien laisser ma question pour l'autre côté, s'il y en a une.

Le sénateur Cools: Et j'aurai été heureuse de le faire également. Les sénateurs viennent toujours en dernier.

Mr. Lowther: Y a-t-il des preneurs de ce côté? Sinon, je vais continuer.

Nous avons entendu les positions des ministres et je les ai trouvées très intéressantes. J'essayais de comparer avec les témoignages que nous avons entendus au cours de nos déplacements dans le pays. Sur certains points, je pense que les points de vue se rejoignent en ce qui concerne la violence. Nous partageons tous ces préoccupations. Mais il y a un domaine qui ne me paraît pas encore très clair.

Lorsque nous avons tenu nos audiences dans le pays et avons entendu des témoignages, j'avais l'impression qu'il était dans l'intérêt de l'enfant d'avoir un lien aussi proche et aussi continu que possible avec les deux parents et que, quelles que soient nos recommandations, nous devrions faire notre possible pour renforcer et maintenir la continuité du lien, un lien très proche, avec les deux parents.

Je ne suis pas sûr d'avoir entendu cela ici. Ce que l'on a dit ici c'est que les enfants doivent être pris en charge par quelqu'un qui les aime. C'est très bien, mais ce n'est pas la même chose que d'avoir deux parents.

Est-ce que mon interprétation est erronée ou s'agit-il d'une représentation exacte de la différence de position?

Mme Fry: Je suis désolée si c'est ce que vous avez compris, car ce n'est pas du tout ce que j'ai dit. J'ai dit que dans les cas où les deux parents cherchent à régler un conflit concernant la garde et le droit de visite, on doit toujours prendre en compte l'intérêt de l'enfant et non le droit de l'un ou l'autre parent sur cet enfant.

The child is not a commodity. I think that is what I was saying. But I think the question here is, if it ever turns out that neither parent is good for the child, there obviously has to be someone who is going to be good for the child. We're not talking about a blanket statement. We're just saying that if you take the cases and you make sure that the best interests of the child for love, for continuity, for emotional support, for freedom from violence, for safety, etc., are all met, the chances are that one or both parents—again, we're back to the statement that was made. We're not talking about the majority of divorces here. We're talking about the ones where there is a great deal of conflict and there is a great deal of anger.

Generally, these particular cases have other background to them. There are other reasons for the conflict, other things. You need to look at the whole lifetime of the marriage and the things that led up to where they got to. You can't just look at it in a vacuum.

Mr. Lowther: I certainly understand that for these high-conflict situations there's no silver bullet, as you said. I think in this committee we've come to realize that this is a big issue, that there's no quick fix. But what would give me a great deal of comfort, or at least consistency with what I think we heard from the witnesses, is that when there's no evidence of abuse or neglect, our approach to this problem should be — and this is what I thought I heard the witnesses say — that it is in the best interests of the children to make every effort possible to maintain a close and continuous relationship with both parents.

Now, I realize there will be these issues on the fringes that are very difficult, but as an underlying principle, we're trying to say it is in the best interests of the children. This is what we're hearing and what we're trying to reflect, I think, in this committee — to try to maintain a good relationship, a close one, with both parents.

Would you agree with that?

Ms Fry: Where there is no evidence of violence or evidence of abuse, I think what you should be looking at is how the parents find a way of resolving their personal conflicts so that the child is not caught in the middle, so that the child gets an opportunity to have a good relationship with both parents.

Mr. Lowther: You said at the beginning that where there isn't evidence of that, you do agree: Both parents.

Ms Fry: Yes.

Mr. Lowther: Good.

Ms Fry: But I think you have to look at the history, look at the causes, look at the context of the situation and not just take it in a vacuum with the broad statement that both parents are absolutely necessary for the well-being for the child.

Mr. Lowther: Yes. I think that's excellent. It's quite encouraging to hear that you concur there.

I personally have acquaintances who have been subject to violent abuse in the home. They're tragic situations, and I wish we could move quicker on them.

L'enfant n'est pas une marchandise. Je pense que c'est ce que j'ai dit. Mais je pense que s'il arrive que ni l'un ni l'autre des parents n'est bon pour l'enfant, il faut évidemment trouver quelqu'un qui le sera. Ce n'est pas un énoncé général. Nous disons simplement que selon les cas, si l'on sert l'intérêt de l'enfant en ce qui concerne l'amour, la continuité, le soutien émotionnel, l'absence de violence, la sécurité, et cetera. les possibilités que l'un ou les deux parents... Là encore, nous revenons à ce qui a déjà été dit. Nous ne parlons pas de la majorité des divorces. Nous parlons de ceux où il existe un conflit grave et où il y a beaucoup de colère.

En général, il y a d'autres problèmes associés à ces cas particuliers. Il y a d'autres raisons au conflit. Il faut tenir compte de toute la durée du mariage et des facteurs qui ont mené à la situation présente. On ne peut pas examiner la situation dans le vide.

Mr. Lowther: Je comprends très bien que dans ces cas de conflit grave, il n'y ait pas de solution magique, comme vous l'avez dit. Je pense que le comité en est venu à se rendre compte que c'est une question importante à laquelle il n'y a pas de solution simple. Mais ce qui me rassurerait beaucoup, ou ce qui correspondrait au moins à ce que les témoins nous ont dit, c'est que lorsqu'il n'y a pas de preuve de maltraitance ou de négligence, nous devrions aborder le problème — et c'est ce que les témoins nous ont dit, il me semble — en prenant pour hypothèse qu'il est dans l'intérêt de l'enfant de faire en sorte qu'il continue d'avoir des liens étroits avec les deux parents.

Je sais très bien qu'il y aura des questions connexes qui seront difficiles à résoudre, mais en principe, nous essayons de penser en termes de l'intérêt des enfants. C'est ce que l'on nous a dit et c'est que nous essayons d'exprimer, je pense, dans ce comité — essayer de maintenir une bonne relation, une relation étroite, avec les deux parents.

Êtes-vous d'accord avec cela?

Mme Fry: Lorsqu'il n'y a pas de preuve de violence ou d'abus, je pense qu'il faut se demander comment les parents peuvent trouver un moyen de résoudre leurs problèmes personnels pour que l'enfant ne soit pas pris au milieu et qu'il ait l'occasion d'avoir de bonnes relations avec les deux parents.

Mr. Lowther: Vous avez dit au début que lorsqu'il n'y a pas de preuve, vous êtes d'accord, les deux parents.

Mme Frv: Oui.

Mr. Lowther: Bien.

Mme Fry: Mais je pense qu'il faut tenir compte de l'histoire, des causes, du contexte et ne pas simplement dire de façon très générale que les deux parents sont absolument nécessaires au bien-être de l'enfant.

Mr. Lowther: Oui. Je pense que c'est excellent. Je trouve encourageant que vous soyez d'accord.

Je connais personnellement des gens qui ont été victimes de violence à la maison. Ce sont des situations tragiques, et j'aimerais que nous puissions agir plus rapidement. I also have heard on this committee how false accusations of abuse have been used in power plays in divorce situations. Again, under the banner of "best interests of the children," would you include false accusations of violence or abuse as a type of abuse, or at least certainly not in the best interests of the children, and at least a form of abuse itself? False accusations is a form of abuse itself, perhaps. Would you agree?

Ms Fry: I don't know; "Abuse against whom?" would be the question. I think the question here is that if there is an accusation of abuse, then it should be investigated as soon as possible. We talked about timelines being very close and very quick here. I think in any false accusations, perjury is going to be the first thing the court would have to say. If you bring and swear before a court that this is so, and brought false evidence, again, you would be subject to perjury on whatever grounds. And those are the ways you should deal with the issues.

I don't see that it's in the best interests of the child for any one person to be suggesting that a parent is thrown into jail because of a false allegation.

Mr. Lowther: And I certainly wasn't suggesting that. Where I'm going with this is, again, under the banner of "best interests of the child." We all recognize that violence is not in the best interests of the child, whether it's directed at the child or one of the spouses. But I'm wondering if we shouldn't include, from what we heard across the country on this, that false accusations should be included under that same heading, that they are also not in the best interests of the child, and almost, if not on par, with violence.

We tend to get serious about violence, proven violence, as we should, but we don't seem to take the same level of concern about false accusations. It's, "Oh, it's false; okay, it all goes back to normal, and everybody's happy, and no one's hurt." Well, I'd suggest that someone is hurt: the child is hurt, the one who's been accused is hurt, and—

The Joint Chairman (Senator Pearson): Mr. Lowther, I know it's an important issue, but we have two more people who'd like to speak, and we have talked about false allegations before.

Mr. Lowther: Fair enough.

Ms Fry: I'd like to quickly comment, though, that if you're going to move forward and ask, "What does a false accusation mean, and how does that abuse the child?" The other question you then would have to ask is, "What of parents who do not observe access, and who say they're coming to pick up the kid this weekend and don't?"

Should that constitute a hurt? How do you balance those things off? You can't just look at one side and not look at the other side.

So the question is, if parents are continually letting their children down when they say they will pick them up, etc., where do you figure that into the access equation? You have to still take each individual case as it goes and look at how you work it out and how you resolve it.

On nous a dit également que l'on utilise les fausses accusations de maltraitance pour établir un pouvoir dans les cas de divorce. L'à encore, sous la bannière de «l'intérêt de l'enfant», incluriez-vous les fausses accusations de violence ou d'abus comme un type d'abus ou tout au moins comme quelque chose qui n'est pas dans l'intérêt des enfants; au moins une forme d'abus en soi? Les fausses accusations pourraient être une forme d'abus peut-être. Seriez-vous d'accord?

Mme Fry: Je ne sais pas. La question serait de savoir «Abus contre qui». Je pense que dans les cas d'accusation d'abus, il faut enquêter le plus rapidement possible. Nous avons parlé de l'importance de la rapidité d'action. Je pense que dans ces cas de fausses accusations, le faux témoignage sera la première chose dont traitera le tribunal. Si vous venez prêter serment devant un tribunal et faites un faux témoignage, vous feriez l'objet d'une accusation de faux témoignage, quelles qu'en soient les raisons. C'est la façon de régler cette question.

Je ne pense pas qu'il soit dans l'intérêt de l'enfant de proposer d'envoyer un parent en prison pour une fausse allégation.

Mr. Lowther: Ce n'est pas ce que je suggérais. Je parle encore une fois ici dans le contexte de «l'intérêt de l'enfant». Nous savons tous que la violence n'est pas dans l'intérêt de l'enfant, qu'elle soit dirigée contre l'enfant ou le conjoint. Mais je me demande si nous ne devrions pas inclure, d'après ce que l'on nous a dit dans le pays à ce sujet, les fausses accusations sous la même rubrique, c'est-à-dire qu'elles ne sont pas dans l'intérêt de l'enfant et sont pratiquement assimilables à de la violence.

Nous réagissons fortement à la violence, à la violence reconnue, comme il se doit, mais nous ne semblons pas nous préoccuper autant des fausses accusations. On dit: «Oh, c'est faux. Très bien, tout revient à la normale et tout le monde est content personne ne souffre». Eh bien, je dirais que quelqu'un souffre: l'enfant souffre, la personne qui est accusée souffre, et...

La coprésidente (Le sénateur Pearson): Monsieur Lowther, je sais que c'est une question importante, mais il y a deux autres personnes qui aimeraient intervenir, et nous avons déjà parlé des fausses accusations.

Mr. Lowther: Très bien.

Mme Fry: J'aimerais dire rapidement cependant que si l'on pose la question: «Que signifie une fausse accusation et en quoi cela est-il un abus à l'égard de l'enfant?», on doit aussi poser celle-ci: «Qu'en est-il des parents qui ne respectent pas le droit de visite et qui disent qu'ils vont venir chercher l'enfant une telle fin de semaine et ne viennent pas?»

Cela constitue-t-il une souffrance? Comment équilibrer tout cela? On ne peut pas tenir compte que d'un seul point de vue.

La question est donc la suivante: si les parents déçoivent continuellement leurs enfants en n'allant pas les chercher, et cetera., comment intégrez-vous cela à l'équation droit de visite? Il faut continuer d'étudier chaque cas particulier et voir comment le résoudre au mieux.

The Joint Chairman (Senator Pearson): Ethel Blondin-Andrew, do you have a comment on that?

Ms Blondin-Andrew: Actually, I do, on the whole issue of what's in the best interests of the child.

The Convention on the Rights of the Child, Senator, is very clear, in article 9, sections 1 and 3 in particular, on the rights of children in such circumstances. In fact, if I could, I'll read article 9, section 3:

State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

This of course comes out of the minister's department. Article 18 also makes very specific reference; it even goes as far as to say:

States Parties shall use best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

And so on and so forth.

It would be a good reminder that we support this convention, and this is the reflection of the underpinnings of our legislative mandate, and where we want to go in terms of policy. So it would be a good reminder to look at those particular sections.

The Joint Chairman (Senator Pearson): I know both ministers need to leave. I have two people on the second list who will both be quick, right?

Mr. Mancini: Thank you. I have two very quick questions.

One of the issues coming out of the discussion you had with Mr. Lowther — and you're right, every single case is so different — is that we've heard on this committee that there ought to be a presumption in determining custody in favour of the primary caregiver. We've heard that there ought to be a presumption of joint custody. As parties approach the court, we've heard that there ought to be a presumption of shared custody.

First of all, do you think there ought to be a presumption at all, and if so, which one?

Ms Fry: It depends on what you mean by a presumption of joint custody. If it means that you must mandate joint custody, then I don't think that is reasonable or fair. Again, as Ethel read it out here, a child should have contact with, and the right to have, both parents, except when to do so is not in the best interests of the child.

I think what we're talking about here is that if both parents believe the child has a right to a loving, caring relationship, and that the child has the right to be free from intimidation, manipulation and violence inflicted on each other by the other, whether it be verbal or otherwise, then those parents will, in the best interests of the child, find a way to resolve that, and remove the child from being the centrepiece of whatever their conflicts are.

La coprésidente (Le sénateur Pearson): Ethel Blondin-Andrew, avez-vous des observations à ce sujet?

Mme Blondin-Andrew: En fait, oui, sur toute la question de l'intérêt de l'enfant.

La Convention sur les droits de l'enfant, est très claire, en particulier l'article 9, paragraphes 1 et 3, sur le droit des enfants dans ces situations. En fait, j'aimerais lire l'article 9, paragraphe 3:

Les parties respectent le droit de l'enfant qui est séparé de l'un ou des deux parents à entretenir des relations personnelles et un contact direct régulier avec les deux parents, sauf si cela est contraire à son intérêt.

Cela bien entendu vient du ministère. L'article 18 est également très précis à ce sujet et va même jusqu'à dire:

Les parties font tout leur possible pour faire reconnaître le principe voulant que les deux parents ont des responsabilités communes dans l'éducation et le développement de l'enfant.

Et ainsi de suite.

Je vous rappelle que nous appuyons cette convention qui est la source de notre mandat législatif et de notre orientation politique. Il serait donc bon de relire ces articles.

La coprésidente (Le sénateur Pearson): Je sais que les deux ministres doivent nous quitter. J'ai deux personnes sur la deuxième liste qui vont faire vite, n'est-ce pas?

Mr. Mancini: Merci. J'ai deux questions très rapides.

Une des questions qui ressort de la discussion que vous avez eue avec M. Lowther — et vous avez raison, chaque cas est différent — est que, d'après ce que l'on a dit au comité, il y a une forte présomption, au moment de décider de la garde, en faveur du principal prestataire de soins. On nous a dit qu'il devrait y avoir une présomption de garde conjointe. Lorsque les parties en arrivent au stade des tribunaux, on nous a dit qu'il devrait y avoir présomption de garde partagée.

Premièrement, pensez-vous qu'une présomption devrait exister, et dans ce cas, laquelle?

Mme Fry: Cela dépend de ce que l'on entend par présomption de garde conjointe. Si cela veut dire que vous devez ordonner une garde conjointe, je ne pense pas que cela soit raisonnable ou juste. Encore une fois, comme Ethel l'a lu, un enfant doit être en contact avec ses deux parents, et a le droit d'avoir deux parents, sauf lorsque cela n'est pas dans son intérêt.

Je pense que si les deux parents croient que l'enfant a droit à de l'amour et à des soins et qu'il a le droit d'être libre de toute intimidation, manipulation et violence infligée à l'un ou l'autre des parents, qu'elle soit verbale ou autre, ces parents, dans l'intérêt de leur enfant, trouveront un moyen de résoudre le problème et d'éviter que l'enfant soit au centre de leur conflit.

So we have to think about what the onus is on the parents as well. Presuming that parents will automatically and naturally do all of those things is not taking into consideration reasons for separation and divorce in the first place. It brings with it a great deal of pain and anger and all kinds of things.

So I think we're back again to talking about "presuming." You should talk about how the child can have access to both parents unless it is not in the best interests of the child to do so. You have to recognize that from all of the perspectives of what is in the best interests of the child, including freedom from intimidation and manipulation.

Mr. Mancini: My second question, I'll be very brief on. It doesn't fall squarely within our mandate, but we can't ignore it. It keeps coming up.

You've talked about flexibility, and the need for flexibility, and I agree with you. In terms of the mandated maintenance payments — and I don't want to get into that to too great an extent — ought there be, in your opinion, flexibility on the part of a husband and wife to contract out of those tables if they think it's in the best interests of the child? I'm not saying the court should deviate, but if the parties themselves say, "Look, the supporting parent has to pay so much," should they have the freedom to contract out of that, if they so desire?

Ms Fry: If custody and access is a lever that is being used to negotiate maintenance, no, they should be separate issues, because too often maintenance is used as a bit of a blackmailing tool to deal with custody and access: "I won't pay unless —," or "I won't let you see the kid unless —." Once again, the child is being used as a pawn, and once again, if you consider that the parents believe they have the right to this child — which I disagree with entirely — the child has a right to have the ability to live in the same economic way it would have lived if both parents were living together. A child has a right, therefore, if those parents are well-to-do and could have sent the kid to university, to go to university. If they could have given the child the best dental care, then they should be able to give the child the best dental care.

Again, what is in the best interests of the physical, emotional and spiritual well-being of the child? None of that can be detracted. One of them is, you have to take care of the kid. Children need money to grow and to get clothes and be fed, and for health care and dental care, etc.

Senator DeWare: While we have you here, three quick questions.

One, we're concerned about the phrase "custody and access." We would like to see if we can find a way to change that, if possible. I know it would make a reflection in a lot of legislation. "Custody" also means "incarceration" in some ways, and we'd like to get rid of that, and come to "parenting" or something.

Our committee has talked a lot about a parenting plan, that parents, before they divorced, were parents before. They should have to develop a parenting plan to show how they're going to Nous devons donc tenir compte du fardeau qui incombe aux parents. Le fait de supposer que les parents agiront ainsi automatiquement et naturellement ne tient pas compte des raisons de la séparation et du divorce pour commencer auxquels sont associés beaucoup de souffrances et de colère et toutes sortes d'autres choses.

Je pense que nous en revenons donc à «supposer». Nous devons parler de la façon dont l'enfant peut voir les deux parents à moins que cela ne soit pas dans son intérêt. Il faut en tenir compte dans la perspective de l'intérêt de l'enfant, y compris l'absence d'intimidation et de manipulation.

Mr. Mancini: Ma deuxième question sera très brève. Elle ne relève pas vraiment de notre mandat, mais tant pis, car cela revient souvent.

Vous avez parlé de souplesse et de la nécessité d'une certaine souplesse. Je suis d'accord avec vous. Pour ce qui est des allocations obligatoires — et je ne tiens pas à m'attarder là-dessus — pensez-vous que le mari ou la femme puisse se libérer de ces tables s'il estime que c'est dans l'intérêt de l'enfant? Je ne dis pas que le tribunal devrait changer quoi que ce soit, mais si les parties elles-mêmes estiment que l'autre parent paie trop, devraient-elles avoir la liberté de se dégager de l'obligation si elles le souhaitent?

Mme Fry: Si la garde et le droit de visite deviennent un outil que l'on utilise pour négocier les allocations, non, ces questions doivent être distinctes, car on se sert trop souvent des allocations comme outil de chantage: «Je ne vais pas payer à moins que...» ou «Tu ne verras pas l'enfant à moins que...». Une fois encore, l'enfant est utilisé comme un gage et si l'on considère que les parents croient avoir le droit à cet enfant — ce que je récuse complètement — l'enfant a le droit de pouvoir vivre au même niveau économique que si les deux parents étaient restés ensemble. Par conséquent, si les parents ont de l'argent et auraient pu envoyer l'enfant à l'université, l'enfant a droit d'aller à l'université. S'ils avaient pu donner à l'enfant les meilleurs soins dentaires, ils doivent pouvoir donner à l'enfant les meilleurs soins dentaires.

Encore une fois, quel est l'intérêt de l'enfant sur le plan physique, émotionnel et spirituel? Rien de cela ne peut être modifié. Il faut prendre soin de l'enfant. Les enfants ont besoin d'argent pour grandir, pour être vêtus et être nourris de même que pour les soins de santé, les soins dentaires, et cetera.

Le sénateur DeWare: Pendant que vous êtes ici, j'aurais trois brèves questions.

Premièrement, nous avons certaines réserves en ce qui concerne l'expression «garde et droit de visite». Nous aimerions trouver un moyen de la modifier si possible. Je sais que cela se refléterait dans beaucoup de lois. «Garde» a aussi le sens d'«incarcération» dans certains cas et nous aimerions remplacer ce mot par «rôle parental» ou quelque chose du genre.

Notre comité a beaucoup parlé du rôle parental, du fait que les parents, avant d'être divorcés, étaient des parents. Ils devraient donc préparer un plan pour montrer comment ils vont prendre soin

support these children and all the ramifications of it. The judge would have something to do with that.

Finally, we had a lot of criticism about lawyers and judges — a lot of criticism. Of course, there's always criticism about lawyers and judges. It doesn't matter if it's custody and access or whatever.

Mr. Mancini: Not always well founded.

Senator DeWare: Not always well founded.

I'm wondering if there is some way in this instance, dealing with this court, for there to be a special education process for judges and lawyers, to sensitize them to what they're dealing with here — children and divorce. They have to be sensitized. They have to have a feeling for it.

Those are my three points.

Ms Fry: As long as removing the term "custody and access" and bringing about "joint parenting" or "parenting responsibilities" doesn't mean it's a euphemism for "mandated joint custody." Because I am concerned that this is what it might mean. I'm concerned that it means that parents automatically have rights.

"Parenting" brings about the rights of the parent, again, as opposed to the rights of the child. So we're back to, "Parents have the right to do this, and the right to do that, etc.," when it should be the child's right, too, the kinds of things, under the Convention on the Rights of the Child, that are always going to be in the best interests of the child.

So that's my concern about that terminology.

I think it's extremely important that the justice system in all areas become sensitive to the fact that race, gender, age, language, and disability create massive barriers for access of persons to justice systems. How do judges and lawyers, the justice system, understand how those things present barriers? They must be sensitive to those if they're going to understand the individual realities of the lives of the people they deal with.

If you have a one-size-fits-all solution, you never recognize that people are all different, and face different circumstances. Many of them are doubly and triply disadvantaged by all of those differences that we talked about.

So I think it's important to have a kind of justice system that is not just sensitive to, but that really understands, this concept that equality is not sameness; that equality means recognizing different barriers, and finding ways to remove those barriers so we all get onto a level playing field.

I think that would go a long way to understanding the system and to helping judges and lawyers make good decisions.

Senator DeWare: We could go on all night.

Ms Fry: I know.

The Joint Chairman (Senator Pearson): Do you have a comment, Ms Blondin-Andrew, on that question of the change of language on custody and access and so on?

de leurs enfants et toutes les ramifications possibles. Le juge aurait son rôle à jouer là-dedans.

Finalement, on a beaucoup critiqué les avocats et les juges — nous avons entendu beaucoup de critiques. Bien entendu, on critique toujours les avocats et les juges. Cela n'a rien à voir avec la garde et le droit de visite.

Mr. Mancini: Ce n'est pas toujours bien fondé.

Le sénateur DeWare: Pas toujours bien fondé.

Je me demande si dans ce cas, dans ce genre de tribunal, il est possible d'établir un processus spécial de formation pour les juges et les avocats afin de les sensibiliser à ces situations — les enfants et le divorce. Ils doivent être sensibilisés. Ils doivent se sentir concernés.

C'était là mes trois points.

Mme Fry: Le fait de supprimer l'expression «garde et droit de visite» pour la remplacer par «rôle parental conjoint» ou «responsabilité parentale» ne veut pas dire que c'est un euphémisme pour garde conjointe autorisée. Je crains que c'est ce que cela voudrait dire. Je crains que cela veut dire que les parents ont automatiquement des droits.

Le terme «rôle parental» met en cause les droits du parent par rapport aux droits de l'enfant. Nous en revenons au fait que les parents ont le droit de faire ceci ou cela, et cetera., alors que ce devrait être le droit de l'enfant, tout ce qui, selon la Convention des droits de l'enfant, va toujours dans le sens de son intérêt.

C'est ce qui m'inquiète au sujet de cette terminologie.

Je pense qu'il est extrêmement important que le système judiciaire, dans tous les domaines, soit sensible au fait que la race, le sexe, l'âge, la langue et le handicap créent des obstacles énormes pour les personnes qui veulent accéder au système judiciaire. Comment les juges et les avocats, le système en général, comprennent-ils comment cela constitue des barrières? Ils doivent y être sensibles s'ils veulent comprendre les réalités particulières de la vie des gens à qui ils ont affaire.

Si l'on propose une solution universelle, on ne tient pas compte des différences entre les gens et entre les circonstances. Bon nombre de ces personnes sont doublement et triplement désavantagées par toutes ces différences.

Je pense qu'il est donc important d'avoir un système judiciaire qui n'est pas seulement sensible à ce concept qui veut que l'égalité n'est pas la similitude et que l'égalité signifie la reconnaissance des différents obstacles, mais le comprenne bien et permette de trouver les moyens de supprimer ces obstacles pour avoir des règles du jeu équitables.

Je pense que cela permettrait de comprendre le système et d'aider les juges et les avocats à prendre de bonnes décisions.

Le sénateur DeWare: Nous pourrions continuer toute la nuit.

Mme Fry: Je sais.

La coprésidente (Le sénateur Pearson): Avez-vous un commentaire, madame Blondin-Andrew, sur cette modification des termes garde et droit de visite?

Ms Blondin-Andrew: Actually, I had a comment on the previous one, which was that to support, as suggested, that we legislate that if there can be an agreement struck between the two parties, they opt out of the court battle, would be to presume that of course these two individuals would do what's in the best interests of the child, and I don't think we can take that risk. I think we have to err on the side of the children. We have to make sure they don't slip between the cracks because two individuals are making perhaps a deal that works for them but not necessarily in the interests of the child.

The Joint Chairman (Senator Pearson): Finally, I think you have a brief one, Senator Cools.

Senator Cools: We can let it pass — but thank you.

I want to underscore the point that, more than anything else, I think we have to uphold equality, and that when we uphold equality for men and for women, and uphold, as we said before, the interests of the children, and when we condemn violence and abuse, we condemn it by both genders. When we say children should be protected from it, which I believe they should be, they should be protected from it by both genders.

I was especially struck by the disinclination to ask the courts to extend its protection of its court orders to its children, because I think the state of these children is indeed unfortunate if the court is not prepared to stand behind its court orders, whether those court orders be financial support or access.

My feeling is if a court is not prepared to stand behind its orders, it shouldn't make them, in either respect, either of child support or of access. But we have to somehow or the other come to a position of balance and fairness at the centre.

The Joint Chairman (Senator Pearson): Thank you both very much for coming and spending so much time with us this afternoon. It's been extremely interesting, and we appreciate your comments. I hope you'll look forward, as we do, to the end of this process and the delivery of the report.

The Joint Chairman (Mr. Gallaway): The committee is adjourned until 6:00 p.m.

Mme Blondin-Andrew: En fait, j'aurais une observation sur la question précédente, c'est-à-dire sur le fait que soutenir, comme il a été proposé, une législation selon laquelle, si une entente est conclue entre les deux parties, celles-ci éviteraient une bataille devant le tribunal, serait supposer que naturellement, ces deux personnes agiraient dans l'intérêt de l'enfant. Or je ne pense pas que nous pouvons prendre ce risque. Je pense que nous devons errer du côté des enfants. Nous devons nous assurer qu'ils ne sont pas laissés pour compte parce que deux personnes concluent une entente qui les avantage mais qui n'est pas nécessairement dans l'intérêt de l'enfant.

La coprésidente (Le sénateur Pearson): Finalement, je pense que nous avons une brève question du sénateur Cools.

Le sénateur Cools: J'aurais pu passer mon tour — mais merci.

J'aimerais souligner le fait que plus que tout, je pense que nous devons maintenir l'égalité et que lorsque nous maintenons l'égalité pour les hommes et les femmes et maintenons, comme on l'a dit, l'intérêt de l'enfant et que lorsque nous condamnons la violence et les abus, nous les condamnons pour les hommes et les femmes. Lorsqu'il s'agit de protéger les enfants, ce qu'ils doivent être, ils doivent être protégés par les hommes et les femmes.

J'ai été particulièrement frappée par la réticence à demander aux tribunaux d'élargir l'application de ses ordonnances aux enfants car je pense que la situation de ces enfants est précaire si le tribunal n'est pas prêt à assumer la responsabilité de les faire appliquer, qu'il s'agisse de soutien financier ou de droit de visite.

Il me semble que si un tribunal n'est pas prêt à assurer l'application de ses ordonnances, il ne devrait pas les faire, que ce soit pour l'entretien des enfants ou le droit de visite. Mais nous devons en arriver, d'une façon ou d'une autre, à un équilibre et à une certaine équité.

La coprésidente (Le sénateur Pearson): Merci beaucoup d'être venues et d'avoir passé tant de temps avec nous cet aprèsmidi. Ce fut extrêmement intéressant et nous vous remercions de vos commentaires. J'espère que comme nous, vous attendez avec impatience la fin de ce processus et le dépôt du rapport.

Le coprésident (M. Gallaway): La séance est levée jusqu'à 18 heures.



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APPEARING—COMPARAÎT

The Honourable Ethel Blondin-Andrew, Secretary of State (Children and Youth);

The Honourable Hedy Fry, Secretary of State (Multiculturalism) (Status of Women);

L'honorable Ethel Blondin-Andrew, secrétaire d'État (Enfance et Jeunesse);

L'honorable Hedy Fry, secrétaire d'État (Multiculturalisme) (Situation de la femme);

WITNESSES—TÉMOINS

From Health Canada:

Patricia Walsh, Program Consultant, Family Support;

Lorraine Pelot.

From Status of Women Canada:

Florence Ievers, Coordinator.

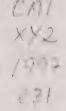
De Santé Canada:

Patricia Walsh, consultante en programme, Aide à la famille;

Lorraine Pelot.

De Situation de la femme Canada:

Florence Ievers, coordonnatrice.





First Session Thirty-sixth Parliament, 1997-98

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Proceedings of the Special Joint Committee on

Délibérations du comité mixte spécial sur

Child Custody and Access

La garde et le droit de visite des enfants

Joint Chairmen: The Honourable LANDON PEARSON ROGER GALLAWAY, M.P.

Coprésidents: L'honorable LANDON PEARSON ROGER GALLAWAY, député

Wednesday, November 25, 1998 Tuesday, December 1, 1998

Le mercredi 25 novembre 1998 Le mardi 1er décembre 1998

Issue No. 37

Fascicule nº 37

Fifty-fourth and fifty-fifth meetings on: Child custody and access arrangements

Cinquante-quatrième et cinquante-cinquième réunions sur:

after separation and divorce

La garde et le droit de visite des enfants après la séparation ou le divorce des parents

INCLUDING: THE SECOND AND FINAL REPORT OF THE COMMITTEE (For the Sake of the Children)

Y COMPRIS: LE DEUXIÈME ET DERNIER RAPPORT DU COMITÉ (Pour l'amour des enfants)

THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS

Joint Chairmen:

Senator Landon Pearson Roger Gallaway, M.P.

Representing the Senate:

The Honourable Senators:

Cohen DeWare
Cook Maloney
Cools

Representing the House of Commons:

Members:

Bakopanos Longfield
Bennett Lowther
Bertrand Mancini
Dalphond-Guiral Mayfield
Finestone Paradis
Forseth St-Hilaire
Harvard St-Jacques
Karetak-Lindell

(Quorum 12)

Changes in membership of the committee:

Pursuant to Standing Order 104(3) and the Report of the Standing Committee on Procedure and House Affairs adopted February 3, 1998:

Ken Epp replaced Eric Lowther.

Bernard Patry replaced Nancy Karetak-Lindell.

Steve Mahoney replaced Robert Bertrand.

Ivan Grose replaced Denis Paradis.

Bernard Patry replaced Denis Paradis.

John McKay replaced John Harvard.

Ivan Grose replaced Nancy Karetak-Lindell.

Ivan Grose replaced Robert Bertrand.

Gar Knutson replaced Sheila Finestone.

Pierrette Venne replaced Caroline St-Hilaire.

LE COMITÉ MIXTE SPÉCIAL SUR LA GARDE ET LE DROIT DE VISITE DES ENFANTS

Coprésidents:

Le sénateur Landon Pearson Roger Gallaway, député

Représentant le Sénat:

Les honorables sénateurs:

Cohen DeWare
Cook Maloney
Cools

Représentant la Chambre des communes:

Députés:

Bakopanos Longfield
Bennett Lowther
Bertrand Mancini
Dalphond-Guiral Mayfield
Finestone Paradis
Forseth St-Hilaire
Harvard St-Jacques
Karetak-Lindell

(Quorum 12)

Modifications de la composition du comité:

Conformément à l'article 104(3) et du Rapport du comité permanent de la procédure et des affaires de la Chambre adopté le 3 février 1998.

Ken Epp remplace Eric Lowther.

Bernard Patry remplace Nancy Karetak-Lindell.

Steve Mahoney remplace Robert Bertrand.

Ivan Grose remplace Denis Paradis.

Bernard Patry remplace Denis Paradis.

John McKay remplace John Harvard.

Ivan Grose remplace Nancy Karetak-Lindell.

Ivan Grose remplace Robert Bertrand.

Gar Knutson remplace Sheila Finestone.

Pierrette Venne remplace Caroline St-Hilaire.

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MINUTES OF PROCEEDINGS

OTTAWA, Wednesday, November 25, 1998 (54)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:35 p.m. this day, in Room 269, West Block, the Chairmen, the Hon. Landon Pearson and Roger Gallaway presiding.

Members of the committee present:

From the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

From the House of Commons: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield and Diane St-Jacques (12).

Acting members present: Ken Epp for Eric Lowther; Bernard Patry for Nancy Karetak-Lindell; Steve Mahoney for Robert Bertrand; Ivan Grose for Denis Paradis; Bernard Patry for Denis Paradis; John McKay for John Harvard; Ivan Grose for Nancy Karetak-Lindell; Ivan Grose for Robert Bertrand and Gar Knutson for Sheila Finestone.

In attendance: From the Research Branch of the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer. Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997 the committee resumed its study on Child Custody and Access.

The committee resumed consideration of a draft report.

At 3:55 p.m., the sitting was suspended.

At 4:10 p.m., the sitting resumed.

It was agreed, — That any dissenting opinions be limited to not more than five pages.

It was agreed, — That the next meeting of the committee be on Tuesday, December 1, 1998.

Madeleine Dalphond-Guiral moved, — That any dissenting opinions be submitted in both official languages, within 48 hours of the receipt of the integrated text of the draft report.

After debate, the motion was agreed to.

At 6:40 p.m., the committee adjourned to the call of the Chair.

ATTEST:

PROCÈS VERBAL

OTTAWA, le mercredi 25 novembre 1998 (54)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 35, dans la salle 269 de l'édifice de l'Ouest, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson, coprésidents.

Membres du comité présents:

Du Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. De Ware, Marian Maloney et Landon Pearson (6).

De la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield et Diane St-Jacques (12).

Membres substituts présents: Ken Epp pour Eric Lowther; Bernard Patry pour Nancy Karetak-Lindell; Steve Mahoney pour Robert Bertrand; Ivan Grose pour Denis Paradis; Bernard Patry pour Denis Paradis; John McKay pour John Harvard; Ivan Grose pour Nancy Karetak-Lindell; Ivan Grose pour Robert Bertrand et Gar Knutson pour Sheila Finestone.

Aussi présents: De la Direction de la recherche parlementaire de la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young, attachée de recherche. Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 29 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude sur la garde et le droit de visite des enfants.

Le comité reprend l'examen d'une ébauche de rapport.

À 15 h 55, la séance est suspendue.

À 16 h 10, la séance reprend.

Il est convenu — Que toute opinion dissidente ne dépasse pas cinq pages.

Il est convenu — Que la prochaine séance du comité ait lieu le mardi 1^{er} décembre 1998.

Madeleine Dalphond-Guiral propose — Que toute opinion dissidente soit présentée dans les deux langues officielles, dans les quarante-huit heures suivant réception du texte intégré de l'ébauche de rapport.

Après débat, la motion est adoptée.

À 18 h 40, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

OTTAWA, Tuesday, December 1, 1998 (55)

[English]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:45 p.m. this day, in Room 705, La Promenade Building, the Joint Chairmen, the Hon. Landon Pearson and Roger Gallaway, presiding.

Members of the committee present:

From the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (6).

From the House of Commons: Eleni Bakopanos, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield, Caroline St-Hilaire and Diane St-Jacques (11).

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the committee resumed its study on Child Custody and Access.

The committee resumed its consideration of a draft report.

At 5:20 p.m., the sitting was suspended.

The sitting resumed *in camera* on Wednesday, December 2, 1998, at 3:41 p.m. in Room 705, La Promenade Building.

The members convened were:

From the Senate: The Honourable Senators Erminie J. Cohen, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson (5).

From the House of Commons: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini and Philip Mayfield (10).

Acting member present: Pierrette Venne for Caroline St-Hilaire.

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer; Ron Stewart, Research Advisor.

The committee resumed its consideration of a draft report.

At 5:36 p.m., the sitting was suspended.

At 5:45 p.m., the sitting resumed.

On motion of Senator Erminic Cohen, it was agreed, — That the draft report entitled "For the Sake of the Children" be adopted as the Report of the committee to Parliament.

On motion of Senator Mabel DeWare, it was agreed — That the committee authorize the printing of the dissenting opinions of the

OTTAWA, le mardi 1^{er} décembre 1998 (55)

[Traduction]

Le comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 45, dans la salle 705 de l'édifice La Promenade, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson, coprésidents.

Membres du comité présents:

Du Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (5).

De la Chambre des communes: Eleni Bakopanos, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield, Caroline St-Hilaire et Diane St-Jacques (11).

Aussi présents: De la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 28 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le comité reprend son étude de la garde et du droit de visite des enfants.

Le comité reprend son examen d'une ébauche de rapport.

À 17 h 20, la séance est suspendue.

La séance reprend à huis clos le mercredi 2 décembre 1998, à 15 h 41, dans la salle 705 de l'édifice La Promenade.

Les membres réunis sont:

Du Sénat: Les honorables sénateurs Erminie J. Cohen, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson (5).

De la Chambre des communes: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini et Philip Mayfield (10).

Membre substitut présent: Pierrette Venne pour Caroline St-Hilaire.

Aussi présents: De la Bibliothèque du Parlement: Kristen Douglas, coordonnatrice de la recherche et Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Le comité reprend son examen d'une ébauche de rapport.

À 17 h 36, la séance est suspendue.

À 17 h 45, la séance reprend.

Sur motion du sénateur Erminie Cohen, il est convenu, — Que l'ébauche de rapport intitulée «Pour l'amour des enfants» soit adoptée en tant que rapport du comité au Parlement.

Sur motion du sénateur Mabel DeWare, il est convenu — Que le comité autorise l'impression d'opinions dissidentes du Parti Reform Party, the Bloc Québécois and the New Democratic Party as appendices to this report, to be printed after the signature of the Joint Chairmen.

On motion of Sheila Finestone, it was agreed — That pursuant to Standing Order 109 of the House of Commons, the committee request that the government table a comprehensive response to this report.

On motion of Judi Longfield, it was agreed — That the Committee instruct the Joint Chairmen to present the report of the committee as adopted in their respective chambers.

On motion of Nancy Karetak-Lindell, it was agreed — That the committee authorize the printing of 5,000 copies of the report of the committee and that if additional funds are remaining in the committee's budget after the first printing, additional copies be authorized.

On motion of Madeleine Dalphond-Guiral, it was agreed — That the committee authorize the destruction, after one year of the date of presentation of the committee's report, of all *in camera* transcripts of the committee's proceedings.

At 6:35 p.m., the committee adjourned to the call of the Chair.

ATTEST:

réformiste, du Bloc québécois et du Nouveau Parti démocratique en annexe au rapport, à la suite de la signature des coprésidents.

Sur motion de Sheila Finestone, il est convenu — Que, conformément à l'article 109 du Règlement de la Chambre des communes, le comité demande au gouvernement de déposer une réponse globale à ce rapport.

Sur motion de Judi Longfield, il est convenu — Que le comité demande aux coprésidents de présenter le rapport du comité tel qu'il a été adopté dans leur Chambre respective.

Sur motion de Nancy Karetak-Lindell, il est convenu — Que le comité autorise l'impression de 5 000 exemplaires du rapport du comité et, s'il reste des fonds dans le budget du comité, que l'impression d'exemplaires additionnels soit autorisée.

Sur motion de Madeleine Dalphond-Guiral, il est convenu — Que le comité autorise la destruction, un an après la date de présentation du rapport du comité, de toutes les transcriptions de ses délibérations à huis clos.

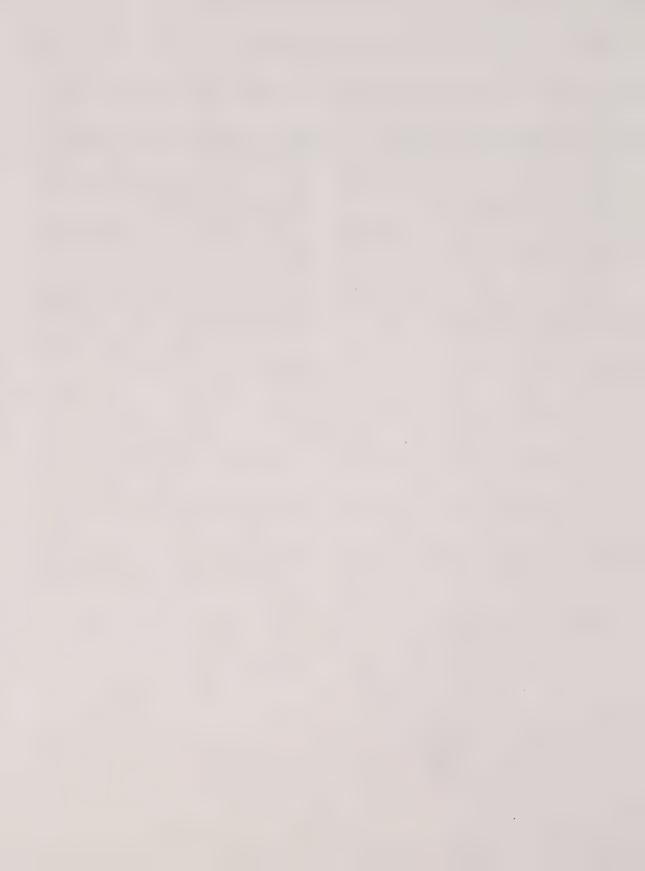
À 18 h 35, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ:

Les cogreffiers du comité,

Catherine Piccinin Richard Rumas

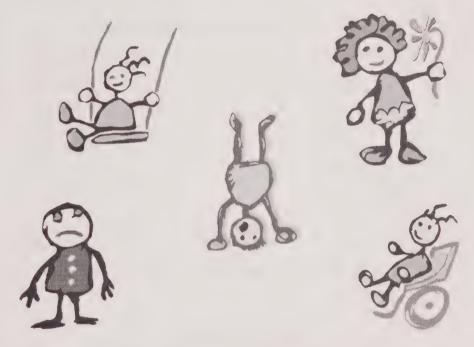
Joint Clerks of the Committee





Parliament of Canada

For the Sake of the Children



Report of the Special Joint Committee on Child Custody and Access December 1998



Joint Chairs
The Honourable Landon Pearson
Roger Gallaway, M.P.

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SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS

JOINT CHAIRS

The Honourable Landon Pearson and Roger Gallaway

REPRESENTING THE SENATE

The Honourable Senators:

Erminie J. Cohen Mabel M. DeWare
Joan Cook Marian Maloney

Anne C. Cools

REPRESENTING THE HOUSE OF COMMONS

Eleni Bakopanos Judi Longfield
Carolyn Bennett Eric Lowther
Robert Bertrand Peter Mancini
Madeleine Dalphond-Guiral Philip Mayfield
Sheila Finestone Denis Paradis
Paul Forseth Caroline St-Hilaire

Paul Forseth Caroline St-Hilaire
John Harvard Diane St-Jacques

Nancy Karetak-Lindell

Original Members agreed to by Motion of the Senate:

The Honourable Senators:

Bosa, Cohen, Cools, DeWare, Ferretti Barth, Jessiman and Pearson — (7)

Joint Clerks of the Committee
Catherine Piccinin and Richard Rumas

Research Staff
Kristen Douglas and Margaret Young
Library of Parliament

Ron Stewart, Consultant

OTHER SENATORS WHO SERVED ON THE COMMITTEE

The Honourable Senators:

Gérald-A. Beaudoin Rose-Marie Losier-Cool

Peggy Butts Shirley Maheu
Thelma Chalifoux Lorna Milne
Joyce Fairbairn Wilfred Moore

Marissa Ferretti Barth Pierre-Claude Nolin

Jean ForestLucie PépinJacques HébertRaymond PerraultDuncan JessimanGerry St. GermainMarjory LeBretonJohn Lynch-Staunton

Derek Lewis Charlie Watt

OTHER MEMBERS OF THE HOUSE OF COMMONS WHO SERVED ON THE COMMITTEE

Hélène Alaire Gary Lunn Claudette Bradshaw Gurbax Mahli Pierre Brien Steve Mahoney John Bryden John Maloney Elinor Caplan Richard Marceau Marlene Catterall Larry McCormick Denis Coderre John McKay Shaunessy Cohen Peter McKay Libby Davies Ian Murray Bev Desjardins Lynn Myers

Wayne Easter Bernard Patry
Ken Epp Pauline Picard
John Finlay Dick Proctor

Jocelyn Girard-Bujold Carmen Provenzano Deborah Grey Karen Redman Ivan Grose John Richardson Monique Guay Guy St-Julien Mac Harb Monte Solberg Jay Hill Peter Stoffer Charles Hubbard Paul Szabo Bob Kilger Paddy Torsney Gar Knutson Pierrette Venne

Walt Lastewka Judy Wasylycia-Leis

THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS

has the honour to present its

SECOND REPORT

Note: The Committee's First Report concerned the extension of the reporting date for the Committee's final report.

FOREWORD

In December 1997, the Special Joint Committee on Child Custody and Access undertook a challenging task; to examine the issues relating to custody and access arrangements after separation and divorce with a special emphasis on the "needs and best interests" of children. We were aware from the beginning that Canadians were deeply concerned about these issues but we rapidly discovered that the scope of the problem was greater than any of us had imagined. Fortunately, the 23 Senators and Members of the House of Commons who served on the Committee were able to bring substantial and varied expertise and knowledge to the table. As co-chairs, we appreciated the dedication and endurance of our colleagues throughout this whole process. Other colleagues came to listen to the witnesses, sometimes to offer opinions and advice, occasionally to replace one of us as required. All members combined the demanding schedule of this Committee with their other responsibilities in the Senate and the House of Commons, including other committees.

Over the twelve months of our study, the committee held 55 meetings and heard from over 520 witnesses. We endeavoured to hear as many people as possible both in Ottawa and in the many cities across Canada we visited during the course of our public hearings. The public hearing process reflected the nature of the subject matter. This is a most important and highly emotional issue; the number of people who attended our hearings in every centre confirmed this. They brought a level of discernible tension that was evident at every meeting. Daily, Committee members listened attentively to a broad continuum of opinions and views. Similarly, pointed questions were directed to those who were witnesses. Pointed questions are a regular feature of the parliamentary process, the cross examination which occurs in every court. The report is the product of the contribution of all witnesses and reflects the broad range of testimony presented to us.

We would like to thank all those who came before us: the legal, mental health, child development, child protection, academic and other experts who brought forward so many suggestions for changes and improvements to the systems and laws that affect the children of divorce; the groups representing the many facets of the issue; and especially the individuals who shared their stories with us so that we could better understand the problem. It was this latter testimony that added the human dimension to our difficult topic.

The Committee also received hundreds of letters and detailed briefs from concerned people and professionals interested in various aspects of our study. All of their comments and recommendations have been taken into consideration.

In its meetings to draft a report, the Committee reflected for long hours on the recommendations it would propose to Parliament. Each member brought his or her own predisposition toward the understanding of the legal, social, and other issues revolving around parenting after separation and divorce. While we were not always in total agreement, there was a constant attempt to move toward consensus on many significant issues and to share and listen to the views presented around the table.

We hope that "For the Sake of the Children" will assist the public to develop a better understanding of a very complex subject that touches the lives of so many Canadians, and it will be seen as a significant step in the process of finding solutions to the problems raised. Most of all, the Committee hopes its recommendations will contribute to the creation of a culture that prevents conflict rather than promotes it.

HON, LANDON PEARSON

ROGER GALLAWAY

Joint Chairmen

ORDERS OF REFERENCE

Extract from the Journals of the Senate, October 28, 1997

Resuming debate on the motion of the Honourable Senator Pearson, seconded by the Honourable Senator Carstairs:

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to parenting arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize parental responsibilities rather than parental rights and child-focused parenting arrangements based on children's needs and best interests;

That seven Members of the Senate and sixteen Members of the House of Commons be members of the Committee with two Joint Chairpersons;

That changes in the membership, on the part of the House of Commons of the Committee be effective immediately after a notification signed by the member acting as the chief Whip of any recognized party has been filed with the clerk of the Committee;

That the Committee be directed to consult broadly, examine relevant research studies and literature and review models being used or developed in other jurisdictions;

That the Committee have the power to sit during sittings and adjournments of the Senate;

That the Committee have the power to report from time to time, to send for persons, papers and records, and to print such papers and evidence as may be ordered by the Committee;

That the Committee have the power to retain the services of expert, professional, technical and clerical staff, including legal counsel;

That a quorum of the Committee be twelve members whenever a vote, resolution or other decision is taken so long as both Houses are represented and the Joint Chairpersons will be authorized to hold meetings, to receive evidence and authorize the printing thereof, whenever six members are present, so long as both Houses are represented;

That the Committee be empowered to appoint, from among its members, such subcommittees as may be deemed advisable, and to delegate to such subcommittees, all or any of its power except the power to report to the Senate and House of Commons:

That the Committee be empowered to authorize television and radio broadcasting of any or all of its proceedings; and

That the Committee make its final report no later than November 30, 1998; and

That a Message be sent to the House of Commons to acquaint that House accordingly.

After debate,

In amendment, the Honourable Senator Cools moved, seconded by the Honourable Senator Watt, that the motion be amended by:

(a) deleting paragraph 1 thereof and substituting the following:

"That a special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize

joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests;" and

(b) adding the following after paragraph 9:

"That the Committee be empowered to adjourn from place to place within and outside Canada.".

After debate,

The question being put on the motion in amendment, it was adopted.

The question then being put on the main motion, as amended, it was adopted.

ATTEST:

Paul Bélisle Clerk of the Senate

Extract from the Journals of the Senate, November 19, 1998

Consideration of the First Report of the Special Joint Committee on Child Custody and Access (extension of reporting date), presented in the Senate on November 17, 1998.

TUESDAY, November 17, 1998

The Special Joint Committee on Child Custody and Access has the honour to present its

FIRST REPORT

In accordance with its Order of Reference from the Senate of October 28, 1997, and from the House of Commons of November 18, 1997, your Committee has considered matters relating to custody and access arrangements after separation and divorce and has agreed to the following:

That the Special Joint Committee on Child Custody and Access be authorized to continue its deliberations beyond November 30, 1998, and that it present its final report no later than December 11, 1998.

A copy of the relevant Minutes of Proceedings is tabled in the House of Commons.

The Honourable Senator Pearson moved, seconded by the Honourable Senator Butts, that the Report be adopted.

After debate.

The question being put on the motion, it was adopted.

ATTEST:

Paul Bélisle Clerk of the Senate

Extract from the Journals of the House of Commons, November 18, 1997

Ms. McLellan (Minister of Justice) moved, seconded by Mr. Kilgour (Secretary of State (Latin America and Africa)), —

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests;

That seven Members of the Senate and sixteen Members of the House of Commons be members of the Committee with two Joint Chairpersons;

That changes in the membership, on the part of the House of Commons of the Committee, be effective immediately after a notification signed by the member acting as the chief Whip of any recognized party has been filed with the clerk of the Committee;

That the Committee be directed to consult broadly, examine relevant research studies and literature and review models being used or developed in other jurisdictions;

That the Committee have the power to sit during sittings and adjournments of the Senate;

That the Committee have the power to report from time to time, to send for persons, papers and records, and to print such papers and evidence as may be ordered by the Committee;

That the Committee have the power to retain the services of expert, professional, technical and clerical staff, including legal counsel;

That a quorum of the Committee be twelve members whenever a vote, resolution or other decision is taken, so long as both Houses are represented, and that the Joint Chairpersons be authorized to hold meetings, to receive evidence and authorize the printing thereof, whenever six members are present, so long as both Houses are represented;

That the Committee be empowered to appoint, from among its members, such sub-committees as may be deemed advisable, and to delegate to such sub-committees, all or any of its power, except the power to report to the Senate and House of Commons:

That the Committee be empowered to adjourn from place to place within and outside Canada;

That the Committee be empowered to authorize television and radio broadcasting of any or all of its proceedings;

That the Committee present its final report no later than November 30, 1998; and

That a Message be sent to the Senate to acquaint that House accordingly.

ATTEST:

Robert Marleau
Clerk of the House of Commons

Extract from the Journals of the House of Commons, November 18, 1998

By unanimous consent, it was resolved, — That the 1st Report of the Special Joint Committee on Child Custody and Access, presented on Tuesday, November 17, 1998, be concurred in.

TUESDAY, November 17, 1998

The Special Joint Committee on Child Custody and Access has the honour to present its

FIRST REPORT

In accordance with its Order of Reference from the Senate of October 28, 1997, and from the House of Commons of November 18, 1997, your Committee has considered matters relating to custody and access arrangements after separation and divorce and has agreed to the following:

That the Special Joint Committee on Child Custody and Access be authorized to continue its deliberations beyond November 30, 1998, and that it present its final report no later than December 11, 1998.

A copy of the relevant Minutes of Proceedings is tabled in the House of Commons.

ATTEST:

Robert Marleau
Clerk of the House of Commons

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SUMMARY OF RECOMMENDATIONS

- 1. This Committee recommends that the *Divorce Act* be amended to include a Preamble alluding to the relevant principles of the United Nations *Convention on the Rights of the Child.* (page 23)*
- 2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the *Divorce Act* be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another. (page 23)
- 3. This Committee recommends that it is in the best interests of children that
 - they have the opportunity to be heard when parenting decisions affecting them are being made;
 - those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;
 - a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;
 - the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and
 - we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction. (page 23)
- 4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child. (page 23)
- 5. This Committee recommends that the terms "custody and access" no longer be used in the *Divorce Act* and instead that the meaning of both terms be incorporated and received in the new term "shared parenting", which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms "custody and access". (page 27)
- 6. This Committee recommends that the *Divorce Act* be amended to repeal the definition of "custody" and to add a definition of "shared parenting" that reflects the meaning ascribed to that term by this Committee. (page 28)
- 7. This Committee recommends that the federal government work with the provinces and territories toward a corresponding change in the terminology in provincial/territorial family law. (page 28)
- 8. This Committee recommends that the common law "tender years doctrine" be rejected as a guide to decision making about parenting. (page 28)
- 9. This Committee recommends that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should extend to schools, doctors,

^{*} Page numbers in parentheses indicate the location of the recommendation in the text of the Committee's report.

- hospitals and others generating such information or records, as well as to both parents, unless ordered otherwise by a court. (page 28)
- 10. This Committee recommends that all parents seeking parenting orders, unless there is agreement between them on the terms of such an order, be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order. Parents should not be required to attend sessions together (page 30).
- 11. This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans. (page 32)
- 12. This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans. (page 32)
- 13. This Committee recommends that the Minister of Justice seek to amend the *Divorce Act* to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court. (page 32)
- 14. This Committee recommends that divorcing parents be encouraged to attend at least one mediation session to help them develop a parenting plan for their children. Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision making should be structured to screen for and identify family violence. Where there is a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution should be used to develop parenting plans only when the safety of the person who has been the victim of violence is assured and where the risk of violence has passed. The resulting parenting plan must focus on parental responsibilities for the children and contain measures to ensure safety and security for parents and children. (page 33)
- 15. This Committee recommends that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the "best interests of the child". (page 44)
- 16. The Committee recommends that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child, and that list shall include
 - 16.1 The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
 - 16.2 The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
 - 16.3 The views of the child, where such views can reasonably be ascertained;
 - The ability and willingness of each applicant to provide the child with guidance and education, the necessaries of life and any special needs of the child;

- 16.5 The child's cultural ties and religious affiliation;
- 16.6 The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
- 16.7 The importance of relationships between the child and the child's siblings, grandparents and other extended family members;
- 16.8 The parenting plans proposed by the parents;
- 16.9 The ability of the child to adjust to the proposed parenting plans;
- 16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
- 16.11 Any proven history of family violence perpetrated by any party applying for a parenting order;
- 16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;
- 16.13 The willingness shown by each parent to attend the required education session; and
- 16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute. (page 45)
- 17. This Committee recommends that the *Divorce Act* be amended to ensure that parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages. (page 46)
- 18. Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:
 - 18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed by this Committee;
 - 18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;
 - 18.3 The desirability of considering both parents' income, or financial capacity, in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is "shared parenting";
 - 18.4 Recognition of the expenses incurred by support payors while caring for their children;
 - 18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;
 - 18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;
 - 18.7 The ability of parties to contract out of the Federal Child Support Guidelines; and

- 18.8 The impact of the Guidelines on the income of parties receiving public assistance. (page 51)
- 19. This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders. (page 55)
- 20. This Committee recommends that the federal government establish a national computerized registry of shared parenting orders. (page 55)
- 21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child. (page 57)
- 22. This Committee recommends that the federal government provide leadership by ensuring that adequate resources are secured for the following initiatives identified by this Committee as critical to the effort to develop a more child-centred approach to family law policies and practices:
 - 22.1 Expansion of unified family courts across Canada, including the dedication of ample resources to interventions and programs aimed at ensuring compliance with parenting orders, such as early intervention programs, parenting education, make-up time policies, family and child counselling, and mediation;
 - 22.2 Civil legal aid to ensure that parties to contested parenting applications are not prejudiced by the lack or inadequacy of legal representation;
 - A Children's Commissioner, an officer of Parliament reporting to Parliament, who would superintend and promote the welfare and best interests of children under the *Divorce Act* and in other areas of federal responsibility;
 - 22.4 The provision of legal representation for children when appointed by a judge;
 - 22.5 Parenting education programs;
 - 22.6 Supervised access programs; and
 - 22.7 Enhanced opportunities for professional development for judges, focused on the concept of shared parenting formulated by this Committee, the impact of divorce on children, and the importance of maintaining relationships between children and their parents and extended family members. (page 59)
- 23. This Committee recommends that the federal government continue to work with the provinces and territories to accelerate the establishment of unified family courts, or courts of a similar nature, in all judicial districts across Canada. (page 63)
- 24. This Committee recommends that unified family courts, in addition to their adjudicative function, include a broad range of non-litigation support services, which might include
 - 24.1 family and child counselling,
 - 24.2 public legal education,
 - 24.3 parenting assessment and mediation services,

- 24.4 an office responsible for hearing and supporting children who are experiencing difficulties stemming from parental separation or divorce, and
- 24.5 case management services, including monitoring the implementation and enforcement of shared parenting orders. (page 64)
- 25. This Committee recommends that, as much as possible, provincial and territorial governments, law societies and court administrators work toward establishing a priority for shared parenting applications, above other family law matters in dispute. (page 64)
- 26. This Committee recommends that in matters relating to parenting under the *Divorce Act*, the importance of the presence of both parties at any proceeding be recognized and emphasized, and that reliance on *ex parte* proceedings be restricted as much as possible. (page 64)
- 27. This Committee recommends that court orders respecting shared parenting be more detailed, readable and intelligible to police officers called upon to enforce them. (page 67)
- 28. This Committee recommends that provincial and territorial governments explore a variety of vehicles for increasing public awareness about the impact of divorce on children and, in particular, the aspects of parental conduct upon marriage breakdown that are most harmful to children, and implement such education programs as fully as possible. To the extent practicable, the Committee recommends that the federal government contribute to such efforts within its own jurisdiction, including the provision of funding. (page 68)
- 29. This Committee recommends that the federal government extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship. (page 68)
- 30. This Committee recommends that the *Divorce Act* be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time. (page 70)
- 31. This Committee recommends that provinces and territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments. (page 72)
- 32. This Committee recommends that federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children. (page 74)
- 33. This Committee recommends that professionals who meet with children experiencing parental separation recognize that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention. (page 74)
- 34. This Committee recommends that the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada. (page 76)
- 35. This Committee recommends that the *Divorce Act* be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a parent and a child in situations of transition, or where there is clear evidence that the child requires protection. (page 76)
- 36. This Committee recommends that the provincial and territorial governments require child protection agencies to provide disclosure of records of investigations to court-appointed assessors examining families who have been the subject of such investigations. (page 77)

- 37. This Committee recommends that the attorneys general of Canada and the provinces, along with police forces and police organizations, ensure that all warrants in child abduction matters provide expressly that their application and enforcement are national. (page 84)
- 38. This Committee recommends that the Attorney General of Canada work to develop a co-ordinated national response to the problem of child abduction within Canada. (page 84)
- 39. This Committee recommends that the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent be recognized as contrary to the best interests of the child, except in an emergency. (page 84)
- 40. This Committee recommends that a parent who has unilaterally removed a child not be permitted to rely on the resulting period of sole care and control of the child, of whatever duration, as the basis for a sole parenting order. (page 84)
- 41. This Committee recommends that the federal government implement the recommendations of the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled *International Child Abduction: Issues for Reform.* (page 84)
- 42. This Committee recommends that the Minister of Foreign Affairs and the Passport Office continue to examine ways to improve the identification of minor children in travel documents and consider further the advisability of requiring that all children be issued individual passports. (page 84)
- 43. This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury. (page 90)
- 44. This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem. (page 93)
- 45. This Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way. (page 97)
- 46. This Committee recommends that the federal government include as the basis for such consultations the family law-related recommendations of the Royal Commission on Aboriginal Peoples and work toward their implementation as appropriate. (page 98)
- 47. This Committee recommends that sexual orientation not be considered a negative factor in the disposition of shared parenting decisions. (page 99)
- 48. This Committee recommends that the Minister of Foreign Affairs work toward the signing and ratification as soon as possible of the 1996 Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. (page 101)

INTRODUCTION

Children whose parents divorce experience a fundamental rearrangement of the households in which they have been living. The foundation under their lives shifts, and for many, the resulting disadvantages — economic, social and emotional — may endure for the rest of their lives. Rising public concern about this issue came to the attention of parliamentarians in 1996 and 1997. During parliamentary study of Bill C-41, which amended the *Divorce Act* to provide for the establishment of mandatory child support guidelines, witnesses came forward in large numbers with compelling stories about the inadequacy of the legal system's mechanisms to deal with custody and access, or parenting arrangements, following divorce.

Particularly when the bill reached the Standing Senate Committee on Social Affairs, Science and Technology, Senators such as Duncan Jessiman, Anne Cools, and Mabel DeWare, Chair of the Committee, made sure that the concerns expressed to them by witnesses were not ignored. Too many witnesses had pleaded with the Senate Committee for consideration of their custody and access-related concerns for Senators to pass the bill without first securing the federal government's commitment that those issues would also be studied. In accordance with the agreement reached between the Senate Committee and the Hon. Allan Rock, Minister of Justice at the time, a parliamentary committee consisting of Senators and Members of the House of Commons was struck to study the issues facing children whose parents divorce, and to look for better ways to ensure positive outcomes for these children.

The Special Joint Committee on Child Custody and Access met first in December 1997 to outline the critical issues concerning parenting arrangements after divorce. Public hearings began in February 1998. The Committee's Terms of Reference comprise the following objectives:

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.

Senators and Members of the House of Commons, from all political parties, approached their task with a great deal of empathy for the suffering of the many adult witnesses, and their children, who had the courage to share their personal tragedies so openly with the Committee. Members were particularly affected by the evidence given by the small number of children and young adults who participated. Most Members of the Committee had some personal or professional experience involving divorce, and so were partially prepared for the evidence they would hear. However, during the 39 often extended public meetings across Canada, at which more than 500 witnesses were heard, Members were continually moved by their many heart-wrenching stories.

The Committee determined from the beginning of its study that its approach would be as open as possible. Every effort was made to accommodate all the individuals and groups that asked to appear as witnesses, and although every possible community and professional organization was offered an opportunity to appear, the huge numbers of individuals who asked to participate made it impossible to hear them all. In every city to which the Committee travelled — including Vancouver, Edmonton, Calgary, Regina, Winnipeg, Toronto, Montréal, Fredericton, Charlottetown, Halifax, St. John's, and Ottawa — the Committee heard from at least a representative sample of the individuals who had submitted requests to appear as witnesses. It

had been the Committee's desire to travel more extensively, but time and financial constraints prevented us from doing so. Witnesses presented a vast diversity of opinion; among them were individual parents, children, fathers' organizations, women's groups, and professionals, including lawyers, judges, social workers, psychologists, physicians and others.

Of course, individuals whose divorces had been more or less amicable were underrepresented among the pool of witnesses who asked to appear. Given the nature of the study, Members understood that those who were least satisfied with the divorce process would be most motivated to testify. Some stories did not therefore represent the full spectrum of views of divorced parents. As a result, Members were cautious about solutions based on exceptional cases or worst-case scenarios. Nonetheless, Members recognized the importance of the painful testimony they heard. There is clearly a need for some dramatic revisions in the way parenting arrangements are decided following separation and divorce.

Most witnesses emphasized the importance of custody and access decision making — the current terminology for parenting arrangements after divorce — in the lives of children. Indeed, a certain number linked their unhappy situations with their own suffering stemming from their parents' divorce. As Nick Bala, Professor of Law at Queen's University, told the Committee:

The issues that arise affect the child's life not only while the child is in that stage of life, but through adolescence and indeed through adulthood and through their entire lives. (Meeting #6)

Witnesses before the Committee were in general agreement that most couples who divorce do so without involving the legal system or with, at the most, some lawyer-assisted negotiation and possibly an interim motion or two. Only rarely do people have their custody and access decisions made by trial courts. Although witnesses generally believed that 10 to 20% of divorcing couples become involved in litigation, there was some disagreement about whether this indicates the predominance of amicable decision making or a reluctance to become engaged in litigation, possibly because of a feeling on the part of at least one parent that litigation would be costly and futile, given the likelihood of a decision in favour of the other parent. Even as a forum of last resort, however, the courts were seen invariably as less than desirable places to make decisions about parenting.

It's virtually a truism to say that divorce, by definition, is a hurtful, hostility-provoking process. To the extent that the process involves litigation about parenting, the process is even more hurtful and more painful. The current legal framework—that is, the adversarial process for custody and access determination—has proved to be absolutely, atrociously ill-suited to the needs of the child. (Ian Solloway, Lawyer, Meeting #15, Montréal)

Members of the Committee agree that struggles pitting parents against each other are far from being in the interests of children. Indeed, they obscure the very focus the Committee was seeking to maintain by emphasizing adults and their preoccupations. Cerise Morris, a Montréal psychotherapist, articulated a concern shared by the Committee:

Some women's advocacy groups have argued that fathers' rights systematically take precedence in custody and access disputes in the Canadian justice system, thereby perpetuating women's inequality and even placing some women and children at risk of violence from abusive ex-partners. Advocacy groups popularly known as "men's rights groups" charge that women are unfairly favoured in custody decisions and are allowed by the justice system to arbitrarily and unfairly deprive fathers of sufficient or any access to their children, even when they're meeting their parental and financial obligations. Of course, sometimes truth can be found in both sets of claims. But the danger, as I see it, lies in allowing this area of family law to become the battleground for gender politics. (Meeting #16, Montréal)

Because it had a mandate to focus on children affected by divorce, rather than on parents who were divorcing, the Committee set out to learn what it could about patterns of divorce in Canada at the end of the twentieth century, the developmental and psychological impact of divorce on children, the array of legal and other mechanisms available to assist with child-centred custody and access decision making, and the potential for improving outcomes for children. One of the first things Members wanted to identify clearly was the prevalence of divorce in Canada and the numbers of children affected.

In 1994 and 1995, according to Statistics Canada, there were 78,880 and 77,636 divorces in Canada. In each of these years, more than 47,000 children were the subjects of custody orders. Divorce rates rose steadily in Canada after 1968, when the first federal divorce legislation was passed, and peaked immediately following the 1985 amendments to the *Divorce Act*, which introduced marriage breakdown as the single ground for divorce, most often based on a separation of at least one year. Although the fault-based grounds of adultery and physical or mental cruelty are still present in the legislation, 1985 is recognized as the beginning of no-fault divorces in Canada. This trend was described by Adrienne Snow, Policy Coordinator for the National Foundation for Family Research and Education:

Ironically, no-fault divorce legislation, as you know, was intended to reduce divorce rates and remove acrimony from divorce proceedings, but in Canada the numbers are stark. Before the introduction of the *Divorce Act* in 1968 the divorce rate sat at 8%. By 1987, the year after the institution of no-fault divorce, that figure had skyrocketed to 44%. Last year it fell to a stable rate of around 40%, according to the Vanier Institute of the Family in Ottawa. (Meeting #36)

The increase in the number of divorces has led to the presence of a wide variety of living arrangements for Canadian children. Most Canadians continue to live in family settings, but the form these families take varies increasingly.

According to the 1996 census, 84% of the Canadian population in 1996 lived in a family setting. Married couples with children made up 45% of all families, married couples without children, 29%, lone-parent families, 15%, common-law couples with children, 6%, and common-law couples without children make up the remaining 6%.... In 1996... 15% [of all children under 17] lived in lone-parent families headed by women, as compared to 2% in families headed by men. (Jim Sturrock, Researcher, Department of Justice, Meeting #3)

It is often difficult to uncover Canada-wide family law statistics. As a result, a number of the Committee's key questions about family law and parenting arrangements went unanswered. Divorce statistics are drawn largely from the Central Divorce Registry, which is a repository of information about pleadings filed in divorce cases. Its chief purpose is to monitor the commencement of proceedings, to ensure that two actions do not go ahead between the same two people simultaneously. Its information is limited strictly to what can be read on the face of divorce documents. No information about informal arrangements, rearrangements, variations in court orders, or other important developments can be derived from Central Divorce Registry data. Joe Hornick, Executive Director of the Canadian Research Institute for Law and the Family, cautioned the Committee about

the difficulty of reviewing laws and making proposals for law reform of the *Divorce Act* without sound empirical research. In the absence of good, objective evidence, all too often decisions are made on the basis of anecdotal and personal experience. (Meeting #20, Calgary)

Statistics Canada, Divorces 1995, Catalogue No. 84-213-XPB, Ottawa, p. 2.

² Many other children, of course, will have experienced parental separation during the same period, in situations where their parents were unmarried or did not seek a divorce.

Witnesses were agreed that in the vast majority of post-divorce arrangements, children are placed in the custody of their mothers. Usually this is by agreement of the parties. Many witnesses felt that this pattern reflects the division of child-care responsibilities in intact households and that parents make this arrangement because it continues the arrangement that existed pre-divorce, or is otherwise in the best interests of their children. Several witnesses cautioned that some men might be inclined to agree to such an arrangement because they believe that their chances of being awarded custody by agreement or by a court are limited. According to Statistics Canada's 1995 report on divorce, 11% of dependent children were placed in the custody of fathers, 68% were placed in the custody of their mothers, and the custody of a further 21% went to the parents jointly.³ These figures include cases where consensual arrangements were made and then formalized by a court, as well as cases where the determination was imposed by a court. They do not include arrangements that were not legally formalized as part of a divorce.

However, the 1995 Statistics Canada numbers on joint custody probably indicate a larger proportion of children in joint custody arrangements than is the actual case, for they reflect only the formal attribution of custody — that is, the parties or the court have identified the custodial arrangement as a joint one. These situations are not all cases where the physical custody of children is split in an equal fashion between the parents. Indeed, the number of children living in arrangements involving substantially shared custody — in terms of time with each parent — is significantly smaller than the 1995 figures indicate. As Statistics Canada reported on 2 June 1998, in the latest release of data from the National Longitudinal Study on Children and Youth, "most children (86%) lived with their mother after separation. Only 7% lived with their father, about 6% lived under a joint custody arrangement, and the remaining (less than 1%) lived under another type of custody agreement." This number more accurately reflects the proportion of children living in an equally shared physical custody arrangement. As social worker Denyse Côté reported from her research on joint custody in Québec,

We cannot rely on the statistics that Statistics Canada provides us on joint custody. The statistics we are given are those concerning agreements reached in Court and they do not reflect what is happening in real life. ... However, I can say that there is currently shared physical custody in approximately five to seven percent of cases. These are very limited figures, which vary across the different studies. They never exceed 10%. (Meeting #16, Montréal)

Another key finding from the latest National Longitudinal Study on Children and Youth data is that children are increasingly likely to experience parental separation at a younger age. "One of five children born in 1987 and 1988 had experienced their parents' separating before they reached the age of five. For people born between 1961 and 1963, this same rate was not attained until they were 16 years old." (Yvan Clermont, Statistics Canada, Meeting #35) Clearly this fact will have implications for our understanding of the developmental impact of divorce on these children, as well as the therapeutic and other interventions we need to adopt as a society to improve outcomes for them.

In the course of this study, it became clear to the Committee that while there must be respect for the constitutional delineation of legislative authority in the area of family law, there is an even greater need for co-ordinated or multi-jurisdictional efforts to resolve many of the problems brought to light. In fact, it has long been recognized in Canada that family law is an area of shared jurisdiction, and although the federal Parliament has exclusive jurisdiction to legislate in the area of divorce, most family law initiatives depend upon federal/provincial-territorial co-ordination. Canadian governments have established the Federal/Provincial/Territorial Family Law Committee to work toward this very purpose. In making many of its law reform and other recommendations, this Committee is fully cognizant of shared federal/provincial

³ Statistics Canada, Divorces 1995, p. 20.

⁴ Statistics Canada, Daily, 2 June 1998, available on-line at http://www.statcan.ca/Daily/English/980602/d980602.htm.

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jurisdiction in the family law area and of the fact that reforms are best initiated in a co-ordinated, multi-level fashion.

Constitutional expert Peter Hogg notes that most family law is within provincial jurisdiction, the exception being the exclusive federal power in relation to "marriage and divorce." The power over divorce extends to matters of corollary relief flowing from a divorce, including support and custody/access. This federal power acknowledges "the desirability of nation-wide recognition of marriages and divorces". Provincial legislatures derive their jurisdiction from the power they have in relation to "property and civil rights in the province," which includes property, civil and contract law. This authority extends to the areas of matrimonial property, adoption, support enforcement, the establishment of paternity, change of name, child protection and, in cases other than those where a divorce is sought, child and spousal support, as well as custody and access.

⁵ Constitution Act, 1867, section 91(26), cited in Peter W. Hogg, Constitutional Law in Canada, 4th Edition (Scarborough: Carswell, 1997), p. 26-1.

⁶ Ibid., p. 26-2.

⁷ Constitution Act, 1867, section 92(13).



CHAPTER 1: The Divorcing Family

I thought how is this possible? Why did it have to happen to me? So I asked my Mom and she said: 'because life isn't fair.' (Witness, age 12)

Very few children in Canada are aware that the *Divorce Act* exists, yet every year tens of thousands of children's daily lives are directly affected by this law. Many children understand that divorce happens, but unlike adults, they assume that it will never happen to their family. When it does, the children's lives are changed forever.

A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown in their marriage. *Divorce Act*, section 8(1).

A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all of the children of the marriage. *Divorce Act*, section 16(1).

In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs and other circumstances of the child. *Divorce Act*, section 16(8).

In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. *Divorce Act*, section 16(10).

These four briefly worded sections of Canada's *Divorce Act* have a major impact on children's lives each year. For many couples these legislative clauses provide a simple and effective way to terminate a relationship that is not working for one or both of the partners. The Committee and its witnesses looked at these clauses with the objective of examining how the provisions could be changed to reduce any negative impact on families and children and to improve outcomes for family members.

When the Special Joint Committee on Child Custody and Access began its work, Members undertook more than a legislative review. The Committee was given a mandate to assess the need for a more child-centred approach to family law policies that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.

Court will help with custody and stuff, but it won't help with the feelings you have inside you. (Witness, age 12)

The Committee heard directly from children about how divorce had affected their lives. These children, who presented as individuals and in groups, told the Committee about the pain and upset that their parents' divorce had caused them. They spoke about their worries and fears, their sense of loss, and their feelings of exclusion from a legal process that had such a direct impact on their lives. These children wanted changes in the ways their parents and the courts made decisions that affected them. In particular, the children and young adults who testified about the impact of their parents' divorce stressed the need for more formal and informal mechanisms for child participation in decisions about parenting arrangements. Children who reported a

positive experience to the Committee generally described post-separation arrangements in which their relationship with both parents was unrestricted and a good deal of control over schedules was in their own hands.

A. Statistics About Children and Divorce

The high divorce rate meant that in 1994 and 1995, more than 47,000 children were the subjects of custody orders under the *Divorce Act*.⁸ As a result, more children — and younger children — are experiencing rearrangements in their households.⁹ Their parents' remarriages or other new relationships following divorce compound the complexity of these children's lives.¹⁰ Some 75% of divorced men and women remarry, so that children from first marriages have to develop relationships with step-parents. In 1992, 13% of divorces were of second marriages.¹¹

Professor James Richardson of the University of New Brunswick, who testified during a meeting in Fredericton, has looked at some of the reasons for the increased divorce rate and concluded that our attitudes about marriage have changed significantly in recent years. First, people no longer believe they should marry or stay married or have children to conform with community expectations. Second, people "take it for granted that they will marry for love and emotional gratification rather than for economic or other instrumental reasons." Third, "more people now than in the past can afford to base marriage on emotional rather than purely economical considerations." 12

Although the divorce rate is increasing, Richardson reports that most divorces are concluded without extensive conflict over parenting arrangements. Referring to a 1990 Department of Justice study, Richardson reports that in Canada,

well over 90% of divorces are now granted without a formal court hearing. As only non-contested divorces can be processed in this way, it is evident that, contrary to popular and media images of divorce, most divorces do not involve bitter and protracted battles over custody and property. Indeed, the evidence from the evaluations is that less than 5% of divorces are contested to the extent that matters must be settled in court. The central issues in these are more often spousal and child support, and division of property, than child custody. ¹³

Finally, Richardson comments on custody arrangements after divorce:

Statistics Canada, Divorces 1995, p. 2

⁹ Statistics Canada, National Longitudinal Study on Children and Youth (see note 4).

Other countries have also become concerned about high divorce rates. The United States concluded a national study, *Parenting Our Children: In the Best Interests of the Nation* (Washington, September 1996), similar to that of this Special Joint Committee, in 1996. This study showed that the number of children in the United States whose parents divorced in 1990 was 1,005,000. Once the children from divorced families were added to those born to unmarried parents, the report noted that "over half of all children sometime before they reach adulthood will live in a home with one parent." The report also identified the economic costs of divorce. Between 1970 and 1991, only 9% of families with children under 18 headed by a married couple were identified as poor, whereas 46% of single parent families headed by women and 23% of such families headed by men were identified as poor.

C. James Richardson, "Divorce and Remarriage", in Families: Changing Trends in Canada (Toronto: McGraw-Hill Ryerson, 1996), p. 233.

¹² Ibid.

¹³ Ibid., p. 231.

The evidence, then, shows that there is no great revolution with respect to child custody. Apparently, most divorcing spouses believe that children are better off with the mother, and the matter is not formally contested. While fathers' rights groups have been able to point to the exceptions, the reality is that most fathers are not interested in custody and day-to-day care of the children (or are advised by their lawyers that their chances of success are probably slim.)¹⁴

Richardson's assertions were contested by many of the witnesses who testified before this Committee.

B. Attitudes Toward Divorce

Most Canadians consider divorce to be a right. Adults are free to marry whom they wish, and if one of the partners finds the relationship unsatisfactory, unhealthy, or unsafe, he or she is free to end the relationship through divorce. The 1985 changes to the *Divorce Act* removed most of the blame from divorce proceedings, and since then Canada has had, in effect, no-fault divorce.

When Canada joined other countries and moved toward less constraining divorce law in the 1960s, '70s, and '80s, the prevalent assumption held by mental health professionals was that it was better for children to grow up in a divorced family than to grow up in a family where at least one of the parents was unhappy with the relationship. While acknowledging that divorce is a difficult and painful experience for all family members, the prevailing belief was that divorce did not cause long-term harm to children. Clinical literature from that era focused on the need for preventive counselling for children. It was assumed that if children were given the opportunity to talk about their feelings, long-term emotional complications could be avoided.

For example, Dr. Richard Gardner, known more recently for his ideas about parental alienation syndrome, wrote in his 1970 book, *The Boys and Girls Book about Divorce*, "the child living with unhappily married parents more often gets into psychiatric difficulties than the one whose mismatched parents have been healthy and strong enough to sever their troubled relationship." ¹⁵

The assumption that children would be better off in a divorced family than in a stressed or difficult intact family resulted in a significant shift in professional thinking about divorce. Until the 1970s, divorce often carried a social stigma, but since then it has become more acceptable in Canadian society. Many articles in the professional literature commented on the relative harmlessness of divorce. Although divorce was recognized as stressful, it was not thought to present any serious emotional dangers for those who experienced it. Happy parents, even if they lived apart, were thought to be able to provide the best environment for their children.

In fact, divorce was seen by many as an opportunity to leave behind a flawed relationship and try again. A 1975 report of the Law Reform Commission of Canada suggested that "divorce is not necessarily destructive to family life." The Commission argued that since many divorced people remarry, "divorce may sometimes offer a constructive solution to marital conflict through the provision of new and more viable homes for spouses and children." ¹⁶

The Committee heard several witnesses testify that most divorces in Canada are "low-conflict" divorces. These witnesses claimed that up to 90% of divorcing parents do so with only minimal conflict. Such parents are apparently able to dissolve their marriages and make good plans for the children without having to go to court. Since mental health research shows that children are harmed by exposure to continuing conflict

¹⁴ Ibid., p. 234.

¹⁵ Richard A. Gardner, The Boys and Girls Book about Divorce (Bantam Books, 1970), p. xix.

¹⁶ Ouoted in Richardson, p. 219.

between parents, it might seem to follow that low-conflict divorces would not be permanently damaging to children

All witnesses agreed, however, that high-conflict divorces are very damaging to the children and the adults involved. No one could give an accurate number for these situations, but the often quoted 10% figure means that, based on the 1994-95 statistics, approximately 4,700 children each year are exposed to ongoing tension, fighting, and even violence between their parents.

C. The Impact of Divorce on Children

In hearings across Canada, the Committee heard moving evidence about the negative impact of divorce on children. Very few witnesses supported the assertion that decisions made on the basis of the parents' right to personal happiness were automatically in the children's best interests. Witnesses' evidence of the detrimental effects of divorce on their children is supported to a great extent by more recent mental health literature on this subject.

Divorce is seen from an individual's as opposed to societal perspective. The *Divorce Act* gives legal status to an individual's decision to terminate his or her marriage, thus recognizing, for legal purposes, an individual's right to marry and to end a marriage. The fact that this individual right, if realized, may impact on the rights of others is not recognized in our laws. Accordingly, the balance of rights, which characterizes most social legislation, is absent from divorce and family law legislation. (Alexandra Raphael, Meeting #13, Toronto)

A few witnesses even suggested that the current no-fault divorce law should be repealed and parents should be required to stay together for the sake of their children. This thinking is apparently behind recent changes in divorce law in the state of Louisiana, which have made it more difficult for parents with children to have access to a quick no-fault divorce. In effect since August 1997, the Louisiana *Covenant Marriage Act* obliges couples to have premarital counseling and to seek marriage counseling if problems arise. The act also reintroduces the concept of conduct into applications for divorce.

In 1989 Judith Wallerstein and Sandra Blakeslee published *Second Chances: Men, Women and Children a Decade after Divorce.* This groundbreaking study, cited by a number of witnesses, followed 161 children from 60 families for 10 years after a divorce. The study provoked a great deal of reaction from mental health professionals, because the findings challenged the idea that most children are unharmed by divorce. ¹⁷ Contrary to Wallerstein's own expectations, most of the children in her study showed severe difficulties in school and in personal and social relationships. There was a noticeable increase in drug and alcohol use and a higher rate of delinquency. The children of divorce showed high rates of depression, aggression and social withdrawal. The study also challenged the idea that helping children express their feelings in therapy at the time of divorce would have long-term preventive benefits. Many were experiencing serious difficulties in their adult relationships.

The professional reaction to this work was highly sceptical. Critics argued that Wallerstein's sample was too small and questioned her research methodology. However, almost ten years later, at the 1998 Annual Conference of the Association of Family and Conciliation Courts in Washington, D.C. — which was attended by a group of Members of this Committee — a panel of sociologists and psychologists argued that

Judith S. Wallerstein and Sandra Blakeslee, Second Chances: Men, Women and Children a Decade After Divorce (Boston: Houghton Mifflin Company, 1989), p. 299.

Wallerstein's findings were correct, because larger research studies in the United States and Great Britain had subsequently supported them.

Lamb, Sternberg and Thompson wrote about the negative impact of divorce on children in 1997:

Most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social and economic distress as well as stresses related to the legal divorce), and diminished contact with many familiar or potential sources of psycho-social support (friends, neighbours, teachers, schoolmates, etc.) as well as familiar living settings. As a consequence, the experience of divorce is a psychosocial stressor and significant life transition for most children, with long-term repercussions for many. Some children from divorced homes show long-term behaviour problems, depression, poor school performance, acting out, low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships. ¹⁸

Amato and Keith analyzed 37 divorce studies, involving 81,000 individuals, that investigated the long-term consequences of parental divorce for adult well-being. This analysis showed a significant pattern of problematic after-effects for adults and children. The authors concluded:

The data show that parental divorce has broad negative consequences for quality of life in adulthood. These include depression, low life satisfaction, low marital quality and divorce, low educational attainment, income, and occupational prestige, and physical health problems. These results lead to a pessimistic conclusion: the argument that parental divorce presents few problems for children's long-term development is simply inconsistent with the literature on this topic. ¹⁹

In 1997, Hope, Power and Rodgers reported on a research project that used as its base a national longitudinal study of 11,407 men and women born in Britain in 1958.²⁰ This study showed that by the age of 33, the adult children of divorced parents were much more likely to engage in problem drinking than adults whose parents had not divorced.

Finally, Wallerstein's research showed that ways had not yet been found to prepare children adequately for the stress of divorce. Therapy and counseling may be helpful at the time, but they do not seem to have long-term preventive effects.²¹

Recent studies on children's attachment patterns also indicate that divorce can cause serious emotional difficulties for younger children (0 to 48 months). Ainsworth and her associates identified four distinctive patterns of childhood attachment to parents, ranging from "secure attachment" to "disorganized and

Michael E. Lamb, Kathleen J. Sternberg and Ross A. Thompson, "The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment", Family and Reconciliation Courts Review, Vol. 35, No. 4 (October 1997), pp. 395-396.

Paul R. Amato and Bruce Keith, "Parental Divorce and Adult Well-Being: A Meta-analysis", *Journal of Marriage and the Family*, Vol. 53 (February 1991), p. 54.

Steven Hope, Chris Power, and Bryan Rodgers, "The Relationship between Parental Separation in Childhood and Problem Drinking in Adulthood", Addiction, Vol. 93, No. 4 (1998), pp. 505-514.

As Wallerstein and Blakeslee indicate in Second Chances, "[We assumed that] if we help children acknowledge and recognize their feelings at the time of divorce they'll do better in the years to come. But from what we saw ten and fifteen years later, this is not the case. Some of the least troubled, depressed, seemingly content and calmest children were in poor shape ten and fifteen years later. One cannot predict long-term effects of divorce on children from how they react at the onset." (p. 15)

disoriented" attachment.²² Dr. Pamela Ludolph and Dr. Michelle Viro reported in 1998 that even the normal upset and disorganization caused by a so-called friendly divorce caused young children to slip from secure feelings of attachment to insecure attachment behaviour.²³ In high-conflict cases, secure children were observed to slip to disorganized and disoriented states of attachment with their parents.

Both the mental health literature and the testimony of witnesses, especially the young people, have convinced this Committee that the impact of divorce on children is significant and potentially harmful. Parents and their advisers must be made aware of the potential repercussions of their decisions on their children and work to minimize any damage. Certainly a number of mitigating factors, many of which are within the control of parents, can ameliorate the post-separation scenario for children. The Committee was impressed by the creative solutions adopted by some parents and encouraged by the handful of very positive stories we heard about successful parenting arrangements. By expanding our understanding of the consequences of divorce for children and investigating all potential aids to parents and children dealing with divorce, this Committee and the others who continue with this work can contribute to improving outcomes for children whose parents divorce.

A number of issues were brought to the Committee by groups and individuals representing the interests of the adult members of divorcing families. Many women presented the Committee with ideas and concerns about parenting arrangements for children after divorce. Some witnesses were mothers who told of their personal experiences. Others represented local and national women's groups. Others spoke of their experiences working in social service agencies and women's shelters. These witnesses identified three main areas of concern.

First, they testified that violence is a major problem for many women during their marriages and that the risk of violence for women and children escalates around the time of separation. Many individual women, as well as researchers and representatives from women's groups, community social service agencies, and women's shelters, testified about domestic violence. These witnesses often referred to statistics documenting the prevalence of violence against women, including Statistics Canada's *Violence Against Women Survey*. That 1993 survey, which documented the experiences of 12,000 women, indicated that 29% of Canadian women reported experiencing violence in their married or common-law relationships. The serious and contentious problem of domestic violence, and the Committee's response to it, is explored in Chapter 5 of this report, which deals with the complications of high-conflict divorces.

Second, they told the Committee that in most families women are still the primary caregivers for children and questioned why this arrangement should change dramatically after divorce. Advocates for women insisted that, in the majority of cases, women are the primary caregivers of children before separation and should therefore continue in that role after separation and divorce. These witnesses stated that most women today would prefer that their husbands play a more prominent role in child care, but they referred to studies showing that women continue to have primary responsibility for the day-to-day care of children. Women's advocates argued that many men ask for shared parenting after divorce in order to continue to exercise control over decision making by their former wives or to avoid having to pay as much financial support for their children, not out of a genuine desire to share parenting responsibilities.

M. Ainsworth, M. Blehar, E. Walters and S. Wall, Patterns of Attachment (Hillsdale N.J.: Erlbaum, 1978).

Pamela Ludolph and Michelle Viro, "Attachment Theory and Research: Implications for Professionals Assisting Families of High Conflict Divorce", Paper given at the 35th Annual Conference of the Association of Family and Conciliation Courts, Washington, D.C., May 1998.

Marriage breakdown is not an appropriate time to redefine the responsibilities of parents to care for their children in the interests of gender equality. Instead, it is a time to decide on the responsibilities in the best interests of the child, based on the child's existing relationship with each parent as it has developed during the course of the child's lifetime. (Elaine Teofilovici, YWCA, Meeting #8)

The parenting responsibilities in our families are allocated in particular ways when parents live together, and that allocation in the majority of families is that women do the caregiving. Interestingly enough, that has not changed significantly in recent years, even though in the past 20 to 30 years there have been huge upheavals in our social structures. I guess the issue I'm urging on the Committee at this point is that there are real limits to the role law can play in changing patterns of post-divorce parenting behaviour. (Carole Curtis, National Association of Women and the Law, Meeting #8)

I can't help but observe that this room is an unfamiliar arrangement for me. There are all these men here. They were never in my court. I don't know where they were, but when the kids were in trouble the mothers came. The men came unwillingly, generally — for a maintenance default or some other problem. (Herbert Allard, Retired Family Court Judge, Meeting #20, Calgary)

Finally, these witnesses reported that problems with shared parenting arrangements are not a question of denial of parenting time: they testified that it is often difficult to keep fathers involved with children after divorce.

Although many fathers testified about the problem of denial of access, many women argued that the problem for them was the opposite: fathers who do not make use of the access they have been given by agreement or in a court order. Mothers and women's groups testified that, in these types of situations, it is the mothers who have to deal with their children's disappointment, sadness and anger when their fathers do not appear when expected.

Picture if you will, two young children dressed in their best clothes, packing their little suitcases or knapsacks and waiting for their dad to pick them up. They're excited; looking forward to the visit. The mom's looking forward to catching up on things around the house or on her work outside of home, on making a few extra dollars, or whatever. They wait and they wait. The phone rings. It's dad. He can't make it.... All too often access is not exercised in a predictable and reliable manner, causing severe disappointments in the children, who then turn to their mom to make it better. The mom then rearranges all of her plans; she diverts her energy towards helping the children work thorough the rejection and disappointment of having the visit cancelled. The cost, financially and emotionally for the children and the mother is high. (Cori Kalinowski, National Action Committee on the Status of Women, Meeting #8)

As has been widely reported by the media, many fathers from across Canada testified before the Committee. Some began preparing their presentations and alerting others to the Committee's existence before public hearings were officially announced. Whether testifying as individuals or as representatives of fathers' groups, these men shared their profound unhappiness about difficult separations and divorces that culminate all too often in a minimal or non-existent relationship with their children. Most of these witnesses emphasized the importance of strong father-child relationships after divorce.

The main grievances brought to the Committee by these witnesses related to obstacles to maintaining fathers' relationships with their children, such as gender bias in the courts, unethical practices by lawyers, flaws in the legal system, false allegations of abuse, parental alienation, and inadequate enforcement of access orders and agreements. The latter three issues are discussed fully in later sections of this report — false allegations of abuse and parental alienation in Chapter 5 (Complications of High-Conflict Divorce), and access enforcement in Chapter 4 (Federal and Provincial Government Roles).

All the concerns expressed by witnesses were considered carefully by Committee Members, and their impact is reflected throughout our recommendations.

D. Child-Parent Relationships Must Survive Divorce

The Committee heard a great deal of moving and sincere testimony from parents, grandparents and professionals about the harm done to children when their relationship with one parent is interfered with by the other parent. Non-residential parents, often fathers, testified not only about their own pain when parenting time is denied, but also about the harm that such denial does to their children.

A great deal of the professional literature about children and divorce concludes that it is in the child's best interests to have continuing contact with both parents after divorce. The exception to this general rule arises when the child experiences violence by one parent toward the child or the other parent. In these cases, most experts believe that the abusive parent's parenting time should be restricted or supervised.

The testimony of several witnesses supported the benefits of regular contact with both parents:

Continuing relationships with and contact with both parents, including step-parents, following separation and divorce is the entitlement of the child and exists regardless of the nature and status of the adults' relationship with each other, with one exception: where contact with a parent or former caretaker places the child at risk physically, psychologically or sexually. (Barbara Chisholm, Ontario Association of Social Workers, Meeting #13, Toronto)

While we argue over the theoretical points of view, legal process, rules of order or problem definition, we miss the most important issue to children and youth: the need to experience and feel a strong bond of love, intimacy and connection to the significant adults in their lives and their communities. In regards to denying access... children, especially very small children are developing very rapidly and not having the time to spend with their parents in those early formative years is time lost forever. (Fred Matthews, Central Toronto Youth Services, Meeting #14, Toronto)

The question for me then becomes how come some children have to live in a situation where one parent's needs seem to be far more important than the other's? Most children I've talked to want to be with both parents. They unconsciously leave stuff at the other parent's home so they'll have to go back. (Kent Taylor, Edmonton and Northern Alberta Custody and Access Mediation Program, Meeting #20, Calgary)

Why shouldn't the focus be on the child's right to insist, post-divorce, post-separation, that they have the right to have this equal participation and to benefit from both a mother and a father? (Sharman Bondy, Lawyer, Meeting #12, Toronto)

Edward Kruk, a professor of social work at the University of British Columbia, has studied children and divorce for 20 years. He testified about a U.S. study showing that over 50% of children lose contact with their non-custodial fathers. Using 1994 Canadian data showing that there were 47,667 children about whom there was a custody decision, 33,164 of whom were placed in sole custody arrangements with their mother, Professor Kruk concluded that 16,582 of these children would eventually lose all contact with their fathers.

Those who work in the area of grief and loss say that there is nothing worse than the loss of a child, no matter how that loss came about, but there is something far worse; for a child, the loss of a parent who's been a constant, loving presence in one's life, the loss of a parent who is part of who one is, an integral part of one's identity. (Edward Kruk, Meeting #27, Vancouver)

We need to have a presumption that the child will continue to have those two parents after separation. It can only be the best thing for the child. How could it not be best for the child to have both parents in their lives? A child is born with two parents. God made it that way. It's God's plan, and it seems unfair that the child should have only one parent after separation and divorce. Let's look at what's best for the child. (Yvonne Choquette, Fairness in Law, Meeting #12, Toronto)

I call this the fixed love pie mentality — that there's only so much love to go around. Children can only benefit from more and more love. But there's that fixed pie mentality that "Oh, if the child sees Daddy, there'll be less love for me." That's pretty immature, but it happens. It's an emotional response to divorce. (Nardina Grande, Step-Families of Canada, Meeting #13, Toronto)

The testimony of these witnesses was actively supported by testimony from many fathers' groups across Canada. These men and their supporters testified that children and their fathers have the right to a continuing relationship, and they spoke of the dangerous consequences when this relationship is interfered with.

Children define themselves by their parents. They form their identity through modeling after their parents. Denying the right of the child to a dependable schedule of parenting contact with the non-custodial parent is nothing less than child abuse, which leads to many costly societal problems as the child grows. (Heidi Nabert, National Shared Parenting Association, Meeting #7)

My family is dead. It is gone. It doesn't exist. The system gave it the final deathblow. Here is how I was helped by the system. It cost me everything — my self-esteem, my confidence, my self-assuredness as a young man, security, peace of mind and the ability to cope with life. For my parents, it cost them a heck of a lot of money and estrangement from me for many years. My entire extended family was destroyed. Most children of divorce seek to escape this painful reality they are trapped in with petty crime, substance abuse, and promiscuity. (Danny Guspie, National Shared Parenting Association, Meeting #7)

E. Gender Bias in the Courts

Many fathers testified that their experience with the justice system showed that there is gender bias in the courts against men. For several decades, ending in the mid-1970s, courts often applied the "tender years doctrine" in making custody and access determinations. This approach held that mothers were generally entitled to custody of a child during its tender years, or period of nurture, from birth to age seven, after which time the father became entitled to custody of the child. The common-law doctrine was thoroughly rejected by the Supreme Court of Canada in 1976.²⁴ Since then, it has occasionally been discussed by judges and replaced by analysis based on consideration of the "best interests of the child". Although the tender years doctrine is not part of current family law or case law, many witnesses expressed the view that judges still operate on the presumption that mothers are better parents.

Canada has a long history of using the gender of the parent to guide custody decisions. This gender preference is created and led by judges in courtrooms, yet the evidence does not support that one sex has innately superior parenting abilities. In fact, reliance on gender to determine custody may contribute to negative outcomes for children by failing to provide the best available parent. (Paul Miller, Men's Educational Support Association, Meeting #20, Calgary)

When I go to court with a male client who is looking for custody, it's always an uphill battle. I always have to have a special fact situation in order to have a good chance at getting custody. (Michael Day, Lawyer, Meeting #12, Toronto)

²⁴ Talsky v. Talsky, [1976] 2 S.C.R. 292.

I've been practising law for 35 years. When I entered the practice of law, Mom stayed at home, Dad was the breadwinner, and she looked after the children. We developed and still carry on with the attitude that mother knows best and father pays best when it comes to issues of child custody and support. (Bruce Haines, Lawyer, Meeting #12, Toronto)

When people are going through a divorce they become very self-centred, and unfortunately their respective lawyers promote that by doing a good job for them... My focus is to tell them they are still a family. They may be a family that is split and separated but they are still a family and until their children reach the age of majority they are a family and it's in their interest to get along so the children don't suffer.... My finding is that there are a lot of nurturing fathers out there. I've had some women tell me they don't care how the assessment turns out because they are going to get custody of the children anyway "because they always give custody to the woman". (Marty McKay, Meeting #13, Toronto)

Wayne Allen, of Kids Need Both Parents, quoted Judge Norris Weisman of Toronto in support of his argument that gender is not a reliable guide to quality parenting abilities and that both parents must remain involved: "...it is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits." Quoting from a statement by Judge Karen Johnson on July 15, 1993, Mr. Allen continued: "The court should start with the assumption that, absent issues regarding the child's physical, mental or emotional safety, the continued involvement of both parents in the child's life is the desired goal: this involvement ideally will be of the same quality post-separation as pre-separation." (Meeting #13, Toronto)

F. Unethical Practices by Family Law Lawyers and Flaws in the Legal System

Many witnesses, including several lawyers, alleged that some family law lawyers make a practice of escalating the fight between divorcing parents. These practices include encouraging their clients to make false claims of abuse and encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes.

President Lincoln said that there is nothing more dangerous to society than a hungry lawyer. Okay, we now have 25,000 lawyers practising in Ontario, whereas when I started there were 5000. The legal problems the public faces have not increased fivefold. So what we have here is 25,000 hungry lawyers. (Richard Gaasenbeek, Lawyer, Meeting #12, Toronto)

They go into a lawyer's office, though, when they're in a custody access dispute or a divorce situation, they hand over a blank cheque to someone they've never met before, and off they go on this merry ride through the justice system that drains their bank account. That moment, for Canadians, as consumers in our justice system, is a real disgrace. (Michael Cochrane, Lawyer, Meeting #13, Toronto)

I told the lawyer I didn't know what my rights were, that I wanted to end my marriage, and I wanted to know, if I left the house, would I lose my entitlement to the property. His response shocked me. ... He said to me, and I quote,... 'get him to hit you'. This is what a lawyer said to me. In 17 years of marriage, my husband never raised a hand to me. But he went on to say, 'If you get him to hit you, you can have him forcibly removed from your home; you'll get spousal support.' (Heidi Nabert, National Shared Parenting Association, Meeting #7)

Then we have what I would term the barracuda lawyers, and they do inflame the system. I would say they probably do so for financial gain. There are those kinds of lawyers. They're pretty few and far between, but they certainly are there. They take advantage of an emotionally vulnerable

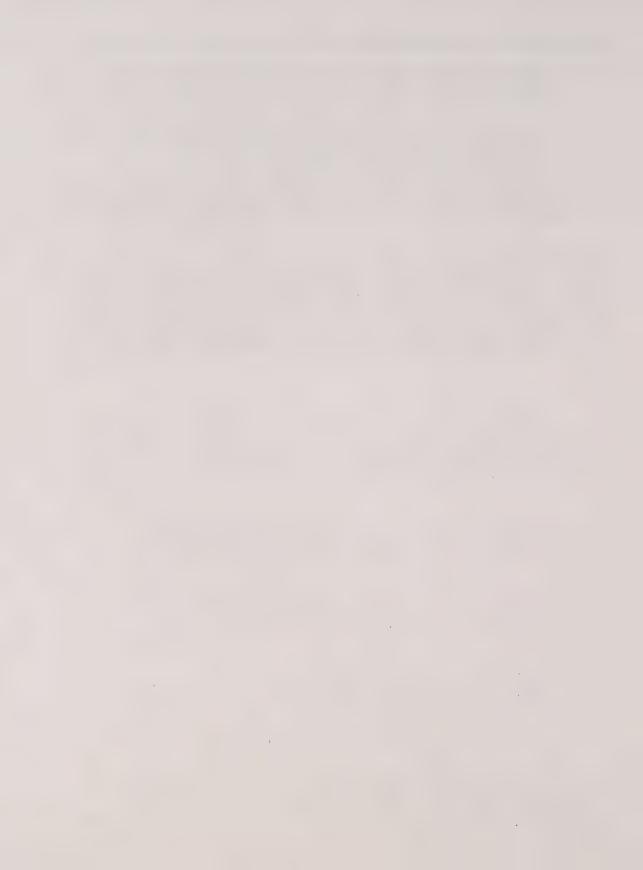
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client and they can influence that client to do a lot of unnecessary and costly things — the things they are doing are legal — to advance their case. (Susan Baragar, Lawyer, Meeting #22, Winnipeg)

False allegations continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities, and without consequence to the accusing parent or lawyer involved. (Louise Malenfant, Parents Helping Parents, Meeting #22, Winnipeg)

Several witnesses also commented on perceived flaws in the family law system, which allow affidavit material to be submitted in court without the challenge of proof. These witnesses were concerned that the same standards of proof required in criminal and civil law do not seem to operate in family courts.

As a criminal lawyer I deal with accused people who, when they come before the court, have the protection of the *Charter of Rights and Freedoms* and the whole common law. It is stunning to me that in family law process, the future relationship between parents and children and grandparents is decided without even minimal attention being paid to due process and propriety... Perjury is common, but how can we put the custodial parent in jail for lying? As a result, the family law process ricochets behind closed doors or even in open court without a transcript and without any of the basic sanctions our courts have traditionally used to control the process. (Walter Fox, Lawyer, Meeting #13, Toronto)



CHAPTER 2: Improving Outcomes for Children

A. Hearing Children's Voices

They think you are nine years old and you don't know anything. But it's your life. (Witness, age 15)

They're deciding your life and your future but they don't even know you. (Witness, age 15)

Children do not ask their parents to divorce. The Committee heard testimony from children across Canada, none of whom said that divorce was a good thing. What they did speak about was the disruption in their lives and the severe emotional distress that accompanied their parents' divorce.

When parents divorce, children are left with a new set of worries and fears about what will happen to them. Children are not prepared for these worries and fears, and they tend to struggle with them on their own.

There's a lot of odd feelings. Feelings you never had before. Everyone says it's not your fault but you wonder sometimes. (Witness, age 14)

Children testified that they felt left out of proceedings that would determine the arrangements for their daily lives for many years to come. Many lawyers and mental health professionals supported the idea that children need a voice in divorce proceedings.

This Committee has heard from mothers, fathers, custodial and non-custodial parents, lawyers, judges, psychologists and a host of others, but I have no sense that this committee has heard from the very people this is all about, the children . . . When one takes the time to listen to the children and truly places their interests first, a greatly different picture can emerge as to what ought to be done in each individual family... Most children, however, know how they feel and what they want and need from their parents. All children need their parents to quit fighting... Children find it incomprehensible that some unseen person called a judge has said that from now on, one parent, usually daddy, is someone you now have visits with, and not very often. You aren't going to see your parent every day, the way you did before. (Kathleen McNeil, Mom's House-Dad's House, Meeting #27, Vancouver)

Since adults are the ones making the decision to divorce, they have some sense of justification for their decision and a sense of confidence that things will work out eventually. Often they also have a support network of family and friends to help them emotionally and practically during the difficult period of adjustment. Finally, adults have direct access to lawyers to help them argue their case and push the arrangement they believe is best for the children. But children are often surprised by their parents' decision to divorce.

The question I had was, why are you getting divorced? Why does this have to happen? (Witness, age 10)

Some children who testified told the Committee that they knew things were tense before their parents separated but they did not expect them to divorce. They felt they had no say in the decision, and they were left unsure about what to expect in the future. They also did not have the support systems available to their parents.

Separation and divorce is a traumatic event for children, regardless of age. When they're told of the decision they have fears, worries and questions. What do they worry about? They wonder, Where will I live? Who will I live with? Do I have to leave? What about my friends? Will we still go on holidays? Will I get to see Dad, Grandma? What about the dog? What about the cat? How much time will I spend with people? Can I still have lessons, hockey, skating... These questions speak volumes on children's interests. Why should we listen? Because their lives are changed forever — emotionally, socially and economically. They have no control over the decision. They have to live with it and, yes, they struggle to accept... No child wants to experience the separation and divorce of his or her parents. (Sherry Wheeler, Alberta Office of the Children's Advocate, Meeting #20, Calgary)

If the children who need us to get this right are not served as they deserve to be, then we will get the children we deserve — children who do poorly emotionally and academically, whose relationships in adulthood are doomed to repeat the mistakes made by their parents, children who will draw disproportionate attention from the criminal justice system, who will draw disproportionately upon all our resources — in short who won't achieve their true potential, and we will fail to achieve our potential as a society and as a nation. (Michael Guravich, President, Family Mediation Canada, Meeting #26)

Children often feel very alone in their emotional distress. Some children testified that they worried about how to tell their friends about the divorce. One little girl told us she was quite convinced she would be the only child in her school from a divorced family

We believe children need to feel loved, secure, and safe. They need to know the divorce is not their fault. They need to know both their parents and their extended family will continue to be part of their lives. They need to know their viewpoints and their wishes have been considered when developing a family plan for how to move forward in their family life. They need to feel empowered to ask for changes to the plan without being made to feel disloyal to either of their parents or other members of the family. (Margaret Treloar, Girl Guides of Canada, Meeting #13, Toronto)

Most important, children feel they do not have a voice in their own future. Several children testified that all children should have someone — a lawyer or child advocate, or even a member of their extended family — to represent them in legal proceedings. One child testified that without anyone to represent her, arrangements were made that left her and her younger brother at risk when they visited one of their parents.

This need for representation does not end with the divorce. Children told the Committee about circumstances that required changes in the original custody and access arrangements. Without someone to help give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations were allowed to continue, and children were put at risk.

Members of the Committee also understood that it is necessary to distinguish between hearing children's views and putting children in the position of having to choose between parents. Many professionals warned the Committee that most children want to remain loyal to both parents after divorce; having to choose one parent over the other would create incredible inner conflict for a child. In fact, many Members of the Committee became convinced that a child's sudden wish to break off contact with a parent could indicate a major problem, necessitating therapeutic rather than legal intervention. Committee Members deliberated carefully on this matter to find solutions that would give children the opportunity to be consulted and heard on decisions that affect them without being pulled into an emotionally dangerous situation.

The importance of hearing children's voices was underlined in the presentation of every child witness before the Committee. This message must be heard by parents, who are to be encouraged to consult their

children respectfully when making parenting and other arrangements upon separation, and by policy makers and legislators. The legal system has already demonstrated significant flexibility in designing non-litigation models for decision making in which children can readily be accommodated. The existing offices of Child Advocates and the Children's Lawyer are government responses that, if expanded, could enhance the ability of children to make themselves heard during divorce processes. The following section, which deals with children's rights, expands on this theme and notes that the United Nations *Convention on the Rights of the Child* requires that Canada make possible the effective participation of children in decision making that affects their lives.

B. Children's Rights

The Convention on the Rights of the Child was opened for signature by the United Nations General Assembly on 20 November 1989. Canada signed on 28 May 1990. After the requisite 30 nations had ratified the Convention, it came into force on 2 September 1990. Canada ratified it in December 1991 and submitted its initial report to the UN Committee on the Rights of the Child in June 1994. This Convention, which is the most widely ratified human rights treaty in history, sets minimum legal and moral standards for the protection of children's human rights, including civil rights and freedoms, rights related to the provision of optimal conditions for growth and development (health care, education, economic security, recreation), and the right to protection from abuse, exploitation, neglect and unnecessary harm. The Convention expressly recognizes the special role of the family in the nurture of the child.

The key provisions of the Convention relating to the subject matter of this study include article 3, which states that in all actions concerning children, the best interests of the child shall be a primary consideration; article 9, which includes the right of the child to contact with both parents if separated from one of them; and article 12, which provides that children have the right to express their views freely in matters affecting them.

Responsibility for implementing the Convention, like other international treaties, is shared in Canada by the federal, provincial and territorial governments. All jurisdictions took part in the preparation of Canada's first report under the Convention. Where action to implement is identified either as having taken place or as being required, the report indicates which level of government is responsible for that action. Paragraph 149 of Canada's First Report indicates that the federal Department of Justice is reviewing the issues of custody and access and states that current empirical data demonstrate that children are badly affected by experiencing or witnessing family violence. The First Report also indicates that the federal government is reviewing the Divorce Act to determine whether measures should be adopted to implement article 12 of the Convention, which deals with respect for the views of the child. 26

A number of witnesses recommended that the Committee give consideration to the Convention, particularly articles 3, 9 and 12 on the best interests of the child, the child's right to maintain relations with family members, and the child's right to be heard in proceedings affecting him or her. Many of these witnesses felt that a reference to the Convention in a preamble to the *Divorce Act* would give judges useful and important guiding principles, thereby improving decisions about parenting arrangements. Katherine Covell, Director of the Children's Rights Centre in Cape Breton, emphasized the relevance of the Convention to custody and access decision making:

²⁵ Canada's First Report on the International Convention on the Rights of the Child, available on-line at http://www.pch.gc.ca/ddp-hrd/english/rotc/rc01index.htm.

²⁶ Ibid., paragraph 82.

Under the United Nations Convention on the Rights of the Child, Canada is obligated to move toward legislation and public policy that is really in the best interests of the child. In the context of custody issues, there is a large body of psychology research suggesting that the best interests of the child are served under the following two conditions. The conflict between parents during and after the divorce should be minimized, and in the absence of abuse, children should maintain meaningful relationships with both parents (Meeting #30, Halifax)

Many witnesses felt strongly that the Convention mandates a greater role for child participation in custody and access decision making than is currently afforded them. The form this participation should take, as outlined in proposals the Committee received, ranged from full, automatic legal representation and party status for every child whose parents divorce, to some other form of participation whereby a child's views, in an age-appropriate and sensitive way, would be solicited and made known to decision makers, whether parents, assessors or a judge. Lawyer Jeffery Wilson, representing one end of this continuum, interpreted the Convention as requiring the provision of state-financed legal representation for every child. Other witnesses, including the Child Advocates of each province in which they exist, recommended that children always have the opportunity to have their voices heard, but noted that current funding levels for child advocacy programs, and the mandates under which they operate, preclude the Child Advocates themselves from filling this role.

Members heard a clear message from several child witnesses. If children are not given the opportunity to participate, if they feel that important decisions about their future are made without consulting them or considering their wishes, then children will not easily accept the decisions made about them. This could have dire consequences for a child's ability to adapt to custodial arrangements, with long-term mental health or other negative implications for that child. The Committee has therefore concluded that in all cases, children should have the opportunity to express their views to a skilled professional whose duty it would be to communicate those views to the judge making a parenting determination. The skilled professional might be a social worker, psychologist, lawyer, family doctor or nurse who is skilled in communicating with children. Members also thought that in some cases a member of the child's extended family might be uniquely well situated to provide support to the child and represent his or her interests before the court.

Committee members felt that it was imperative that children in high-conflict situations, in particular, have the opportunity to be heard and have legal representation. Legal representation for a child is considered necessary whenever the child's interests are not going to be advanced by counsel for either parent. Members were particularly impressed by the efficacy of unified family court systems in which legal services are combined with therapeutic services, such as those provided by counsellors, giving children access to an enabling listening professional.

At the same time, Members were acutely sensitive to the need to avoid putting children in the position of having to choose between their parents. Many Members found the testimony of Michigan Judge John Kirkendall helpful. He told the Committee that although he often consults children to ask them how they feel, he is always careful to let them know that they are not the decision makers. While he considers what they have to say, he tells the children that he will not necessarily make the decision they have requested. Members also thought it important that parents be advised to talk to their children about possible parenting and residential arrangements and rearrangements and that they avoid imposing new arrangements on their children without consultation.

An additional matter related to the rights of children came to the attention of the Committee. The superior courts in Canada have always had an overarching authority to act in the best interests of children, enabling them to provide for children's well-being even when a specific remedy is not provided expressly in statute law. This power comes from the equitable jurisdiction of the court to act as a sort of "super parent" to the child — what is referred to as the court's *parens patriae* jurisdiction. Some Members of the Committee are

of the view that the courts have hesitated to exercise this inherent jurisdiction on behalf of children and should be encouraged to do so. The Committee is therefore recognizing that children have a need and a right to the protection of the courts, particularly the protection afforded by the exercise of the courts' *parens patriae* jurisdiction.

Recommendations

- This Committee recommends that the Divorce Act be amended to include a Preamble alluding to the relevant principles of the United Nations Convention on the Rights of the Child.
- 2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the *Divorce Act* be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another.
- 3. This Committee recommends that it is in the best interests of children that
 - 3.1 they have the opportunity to be heard when parenting decisions affecting them are being made;
 - 3.2 those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;
 - 3.3 a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;
 - 3.4 the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and
 - 3.5 we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.
- 4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child.

C. Reducing Conflict

It's bad when your parents are screaming. It can give you a headache or make you feel sad. And you might just want to grab a teddy bear and lie in the corner and not come out ... for a long time. (Witness, age 12)

The Committee heard many witnesses testify that the majority of divorces are resolved without a great deal of conflict between the parents. These so-called "friendly divorces" are presumed difficult for children, but not permanently damaging. Unfortunately, a significant number of divorcing parents become locked in bitter and sometimes violent disputes over custody and access arrangements. These situations are truly dangerous for children, and the Committee examined the evidence carefully for ways to reduce conflict between divorcing parents, to the benefit of the children. Indeed, the principal objective underlying all the recommendations in this report is to induce as thorough as possible a shift from the current state of family law policies and practices, which all too often escalate conflict between divorcing parents, to a decision-making approach that reduces conflict.

When divorce occurs, society offers no healing rituals. Instead, we dishonour the parties through an adversarial process that requires couples to prepare affidavits that publicly humiliate each other. Family members, friends and neighbours are pressured to take sides, causing permanent rifts, and children are treated as scarce resources to be divided up like chattels. (Barbara Landau, Meeting #11)

Our concern, as mediators, is the well-being of the children. The parents are often too entangled in their emotional problems. There is a heavy layer of emotion in every divorce, even if it is not contested. If it is contested, it is hell. (Philip Shaposnick, Meeting #11)

All the children who testified told the Committee that it felt terrible to be caught in the middle of their parents' fight.

It feels really bad when they fight cause you think, Wow, a few years ago they used to be happily married. (Witness, age 14)

There should be a law that parents can't yell at the children when they get divorced. It's not the child's fault. (Witness, age 8)

The children who testified also said that lawyers and courts do not pay attention to what is important to the child. Several children talked about the need for flexibility in access schedules so that children do not become resentful about missing social and recreational activities because it is time to see a parent. Other children said that the courts do not understand the importance of stepsibling relationships.

Most children testified that it was important for them to maintain a relationship with both parents. The Committee noted that children usually did not use the language of "custody and access" when talking about family relationships; these are legal terms and are not part of most children's vocabulary. Children also tended to measure their relationships not in terms of time but in terms of availability.

Psychologists, psychiatrists and social workers across the country testified that many of the children they see in their clinics are damaged by conflict that continues after divorce.

Research has shown us time and time again that children do not care who has ownership of them but rather they have great concerns about how each parent will be able to maintain their relationship with them. We know that children who experience ongoing conflict between their parents suffer the long-term effects of being caught in between the most important people in their lives. It is a damaging and untenable position to be in. (Resa Eisen, Meeting #12, Toronto)

Dr. Eric Hood, of the Clarke Institute in Toronto, testified that high-conflict divorce situations "are like war zones." The children go back and forth between their fighting parents and "are afraid to tell the truth." These children bear the burden of suffering in divorce. He added:

I can speak very personally about it, because those of us who work in trying to assess and understand these situations — dealing with each parent and with the children, dealing with the parents and kids together... end up very stressed, very troubled by the experience of dealing with these situations. It's as if we're like the children and it makes our stomachs churn. If it does that to me and it's not my family, what's the pressure on the children? (Eric Hood, Meeting #12, Toronto)

I think of family conflict like, unfortunately, an intense war zone when it's at a severe level for children. For the victims of war, one would hope that every once in a while there would be what I think of as a safety zone. When I train volunteers and staff for the Supervised Access Program, I like to use the image of wearing the blue hat, wearing the hat of the United Nations peacekeeper's role. We cannot perhaps end the war, and we cannot determine the outcome on either side, but we can provide the safety zone, and that's really essential for children. (Sally Bleecker, Ottawa-Carleton Parent-Child Supervised Access Program, Meeting #24)

Wilson McTavish is the Director of Ontario's Office of the Children's Lawyer. This government-funded service provides legal counsel for approximately 8,000 children per year, 1,600 of whom are involved in custody/access disputes. He testified that

both parents, and we have found this in every case, love their child. Every child we represent pleads for a reconciliation of their parents. Tearfully they acknowledge that can't happen, and then the child asks us to stop the fighting. (Meeting #12, Toronto)

Several legal and mental health professionals gave testimony that supported the children's view of divorce. All agreed that high-conflict situations are dangerous for children. The Committee explored a number of suggestions from witnesses for reducing the conflict that, to some degree, seems an almost unavoidable aspect of divorce. These suggestions ranged from parenting education programs — to make parents aware of their own conduct during and after separation, its impact on their children, and means by which they might change it or at least shield their children from its effects — to non-litigation models for custody and access decision making, such as mediation.

1. The Language of Divorce

Many witnesses testified that the current language of "custody and access" promotes a potentially damaging sense of winners and losers. These witnesses suggested that more neutral language would help reduce conflict and let both parents focus on their responsibilities rather that their rights. This was seen as an important means of reducing parental conflict by defusing the winner-take-all custody contest. The language of divorce was an important focus for Committee Members, who found the testimony about the impact of the terms "custody", "access", "custodial" and "non-custodial parent" particularly compelling. The use of these words clearly can escalate conflict between divorcing parents, even to the extent of contributing to access denial and other disputes.

The corrosive impact of the current terminology was discussed extensively during the Committee's hearings.

"Custody" is the formal word for imprisonment, and "access" is the formal word used for a prisoner's privilege to see a lawyer, or vice-versa. These are nauseating, abominable words, and they extinguish a child's right to have a father. Let's get rid of these words and concepts now. (Gene Keyes, Meeting #30, Halifax)

As they now stand in current federal legislation, language and terms serve to create that winner-loser scenario that really exacerbates parental conflict during separation and divorce. Such inappropriate language is not family friendly, and it is experienced as demeaning to children who hear themselves referred to in the same language used in the prison system. (Judy McCann-Beranger, Meeting #31, Charlottetown)

In the opinion of a number of witnesses, the current terminology not only increases conflict between parents but promotes a completely erroneous understanding of the decisions about parenting that parents are expected to make when they divorce.

The current language in child custody statutes is problematic in that it connotes the ownership of children. This perpetuates the notion that children are chattel, is antithetical to what is implied in the UN Convention, and is disrespectful to children. The inference of ownership serves to sidetrack what is meant to be a child-centred focus. In turn, it may fan the fires of what may already be an emotionally charged situation. Furthermore, the current legislative language can be disempowering to parents. (Elaine Rabinowitz, Prince Edward Island Provincial Child Sexual Abuse Advisory Committee, Meeting #31, Charlottetown)

Most witnesses recommended that legislators seek new language to describe the parenting decisions that divorcing couples are required to make, although a few cautioned against new legislation, because new legislation invariably means increased litigation, for some at least, while the courts interpret the new legislative language. Nonetheless, the Committee clearly heard a call for change in this area.

The Divorce Act is replete with language such as "custody" and "access" which reflects a bygone era in which women and children were legally chattels in the possession of the head of the household, the father. Instead, the language of the Act should reflect the modern era in which all family members have rights, with both parents equal before the law. Thus, as regards post-divorce parenting, the focus of the Act should be on the formulation of parenting plans. Such plans should reflect a shared responsibility of care and assume the existence of two parenting households. Further, the Act should strive to maximize the involvement of both parents in the ongoing care of the children of the marriage although circumstances may force recognition of resident and non-resident parents. (Howard Irving, Mediator, Meeting #11)

A number of witnesses urged the Committee to recommend terminology based on the new language adopted in other jurisdictions, such as the four discussed in Chapter 3 of this report:

On the issue of language, though, virtually every jurisdiction that has modernized its law in this area in the last decade or so has recognized that terms like "custody" and "access" are not appropriate. Unless you're familiar with the legal terminology, they're not terms that naturally flow to a parent. They have unfortunate connotations. They're not concepts that capture what parents are actually doing or should be doing, and they are concepts that tend to alienate one parent or indeed both parents. So I think we'd like to have legislation that recognizes what it is that parents are really doing. (Nicholas Bala, Meeting #6)

The Committee was offered examples from a number of other jurisdictions as models for new conflict-reducing language. For example, custody and access regimes could be replaced with concepts and terms like "parental responsibility" (Australia), "joint parental responsibility" (United Kingdom), "shared parental responsibility" (Florida), or "residential placement" and "parenting functions" (the state of Washington). Custody itself is often replaced by the concept of "residence" combined with decision-making authority. What is currently referred to as access in Canada may be referred to as "contact", "visitation" or "parenting time" in other jurisdictions. The new terminology is often attached to new substantive legal regimes, some of which presume that joint custody or shared parenting — or alternatively some form of shared decision making without equal time sharing — will be the norm (see Chapter 3).

This Committee is of the view that a shift to new, less loaded terminology is critical to reducing conflict in divorce. Coupled with our intention to reduce conflict, Committee Members feel strongly that the legal regime under the *Divorce Act* must discourage the estrangement of parents and children, and that to do so the

act must ensure that parent-child relationships survive marital breakdown. Therefore, in addition to proposing new language to replace that of custody and access, the Committee concludes that parental decision-making roles should, in most cases, continue beyond divorce. Members hope that this new regime and new language will foster the type of co-operative, child-focused post-separation parenting that will advance the interests of children, and that parents will find their post-separation arrangements more flexible, natural and beneficial to all members of the family.

The Committee concludes that the current *Divorce Act* terms custody and access should be replaced by the concept and the expression "shared parenting". By this, the Committee is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of children. The Committee recognizes that the details of time and residence arrangements for children will vary with the family involved. In view of the diversity of families facing divorce in Canada today, it would be presumptuous and detrimental to many to establish a "one size fits all" formula for parenting arrangements after separation and divorce. By the new term "shared parenting", the Committee intends to combine in one package all the rights and responsibilities that are now embodied in the two existing terms — custody and access — and leave decisions about allocating the various components to parents and judges.

Several other recommendations flow naturally from this proposed change of language. The *Divorce Act* should be amended to remove the current definition of custody, and one defining "shared parenting" in the manner it is defined in this report should be added. The Committee also hopes that the new language will eventually be integrated into provincial and territorial family law statutes, so that children across Canada, regardless of whether their parents are married, would benefit from this new regime in the event their parents separate. The federal government should seek this change through its participation in the Federal/Provincial/Territorial Family Law Committee. Also, with the removal of the concept of custody, the outdated and discredited "tender years doctrine" is clearly no longer useful, and to ensure that it has no further influence, the Committee recommends its rejection.

Throughout this report, and in particular in our recommendations, the Committee has applied the proposed terminology of "shared parenting". Only when referring to the current custody and access regime is the current terminology employed. Of course, where witnesses are quoted, their submissions generally refer to custody or access, as they are referring to matters decided under the current *Divorce Act* regime. Where the Committee uses the words "shared parenting", "shared parenting order", or "shared parenting determination" in a recommendation, those terms are to be interpreted in the manner we have proposed.

Under the new regime and terminology formulated by this Committee, in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles with respect to their children. To ensure that neither parent is excluded unfairly from fulfilling that obligation, the Committee is also recommending change in the way authorities such as schools and doctors provide information to parents. In the event of separation or divorce, important information about the child's development and well-being should be provided directly to both parents.

Recommendations

5. This Committee recommends that the terms "custody and access" no longer be used in the *Divorce Act* and instead that the meaning of both terms be incorporated and received in the new term "shared parenting", which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms "custody and access".

- 6. This Committee recommends that the *Divorce Act* be amended to repeal the definition of "custody" and to add a definition of "shared parenting" that reflects the meaning ascribed to that term by this Committee.
- 7. This Committee recommends that the federal government work with the provinces and territories toward a corresponding change in the terminology in provincial/territorial family law.
- 8. This Committee recommends that the common law "tender years doctrine" be rejected as a guide to decision making about parenting.
- 9. This Committee recommends that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should extend to schools, doctors, hospitals and others generating such information or records, as well as to both parents, unless ordered otherwise by a court.

2. Parenting Education

Many witnesses suggested to the Committee that parenting education immediately following separation would also help reduce conflict between divorcing spouses. These witnesses argued that mandatory education programs for divorcing parents would help make them aware of how divorce affects children and the damage that can be caused to children by ongoing conflict. Parenting education courses, increasingly available across North America, offer the hope of mitigating the negative effects of divorce on children. Early research on the effectiveness of these programs is beginning to provide some grounds for optimism. Witnesses urged the Committee to recommend more comparative research to identify the programs with the best potential.

There was strong support from many witnesses for this type of education. Divorced parents and mental health experts indicated that parents need the opportunity to learn about how the conflict that so often accompanies divorce can harm children. Witnesses also testified that post-divorce education programs help parents gain perspective and develop skills that enable them to behave more appropriately with their children.

My belief is that divorce causes damage to kids no matter how well it's handled. I just believe that. I have not yet come across a situation, even in the best of situations, where there hasn't been some damage caused. Parents, however, are in a position to minimize that damage, but they have to recognize what it is they are doing that causes the damage. They have to want to change that. They have to understand what is happening for their children and they have to be aware of what the options are. Some of them just don't know what else to do; they're reacting out of anger, resentment, hurt, guilt, and pain, and they just don't know what options they have. Once they understand that, they're almost always willing to take a look and try something else. They can see the pain it's causing their children. (Jeanne Byron, Lawyer/Educator, Meeting #26)

There needs to be an understanding of the effect of prolonged exposure to high levels of conflict on children, and on all of the other family members as well, because not only is it difficult for children but it also places the type of stress on parents that diminishes their own personal life and their parenting capacity. (Orysia Kostiuk, Manitoba Parent Education Program, Meeting #26)

Several witnesses presented detailed evidence about parenting education programs offered in their communities. In Alberta, a parenting education program entitled Parenting After Separation has become mandatory — parents must attend a course before they can proceed with an application for divorce. In other

parts of the country, social service agencies, community groups, family court clinics, and at least one law firm offer education programs.²⁷ The Committee learned that in Florida, children also must attend a divorce education program before their parents can proceed with an application to the courts.²⁸

Parenting education programs give participants general information about the separation or divorce process, legal and other issues they will face as parents, and how the transition will affect their children. Some go further to train parents in the types of parenting techniques most likely to prevent children from being exposed to parental conflict. U.S. research about the effectiveness of parenting education programs, while in its early stages, has produced results confirming the usefulness of such programs in advancing the well-being of children affected by parental separation and divorce.

Research on U.S. parenting education programs has indicated the following positive results:

- participating parents were more likely to communicate positively with their children about the other parent, and non-residential parents had greater access to their children;²⁹
- parents demonstrated improved communication skills;³⁰ and
- the programs lowered the exposure of children to parental conflict and increased each parent's tolerance for the parenting role of the other parent.³¹

Although program content varies significantly, most programs emphasize the post-divorce reactions of parents and children, children's developmental needs at different ages, and the benefits of co-operative parenting after divorce. They emphasize the impact of divorce on children and the parenting behaviours most likely to promote children's well-being. Legal issues may also be covered. In most jurisdictions where parenting education programs are mandatory, including Alberta, special programs are offered to victims of domestic violence.

Family Mediation Canada, supported by Health Canada, has recently produced an inventory of Canadian parenting education programs and resources, entitled Families in Transition: Children of Separation and Divorce. This volume reports all the parent education programs — voluntary and mandatory — available across Canada. Over 140 programs, in every province, are listed, as well as a wide variety of videos, books and other resources to which parents and those offering them assistance can refer. The inventory makes clear the variety in form and content of voluntary parenting education programs, as well as their wide availability.

Rob Huston, who testified in Calgary, spoke about his own positive experiences with the Parenting After Separation program, as a result of which, he reported to the Committee, he and his child's mother work together as a team and are parenting their son very successfully and co-operatively.

It's turned out that I'm proud of it. I've been promoting Parenting After Separation. Why? Because we need some changes, and when we get the changes through the mindset of other parents.... (Meeting #20, Calgary)

²⁷ The law firm is Reierson Sealy in Halifax, Nova Scotia.

M. Gary Neuman, Helping Your Kids Cope with Divorce the Sandcastles May (Random House, 1998).

²⁹ Jack Arbuthnot, Cindy Poole and Donald Gordon, "Use of Educational Materials to Modify Stressful Behaviours in Post-Divorce Parenting", Journal of Divorce and Remarriage, Vol. 25, 1/2 (1996), p. 117.

Jack Arbuthnot and Donald Gordon, "Does Mandatory Divorce Education for Parents Work?" Family and Conciliation Courts Review, Vol. 34, No. 1 (January 1996), p. 60.

³¹ Jack Arbuthnot, Presentation to the 1996 Family Mediation Canada Conference, Winnipeg, Manitoba, cited by Jeanne Byron in her brief to the Special Joint Committee on Child Custody and Access, 13 May 1998.

Recommendation

10. This Committee recommends that all parents seeking parenting orders, unless there is agreement between them on the terms of such an order, be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order. Parents should not be required to attend sessions together.

D. Shared Parenting and Parenting Plans

Some men's groups and fathers asked that the Committee consider recommending a presumption in favour of shared parenting or joint custody. They argued that such a presumption was the only way to ensure that both parents negotiated or participated in mediation in good faith and with the children's best interests as the main focus. Without a presumption of joint custody, these witnesses argued, mothers often would not participate in mediation, and the perceived gender bias in the courts would perpetuate the predominance of mothers as the custodial parents. Although the Committee has not recommended establishing a legal presumption in favour of either parent or any particular parenting arrangement, the Committee does see the value of shared decision making and even substantially equal time sharing where appropriate. For parents with the emotional and financial resources necessary to make a joint physical custody arrangement work, it is the Committee's view that such arrangements can encourage the real involvement of both parents in their children's lives.

The Committee heard testimony from psychologists and social workers who stated that children benefit from maintaining a relationship with both parents after divorce. These clinical impressions were supported by many research studies showing that children's emotional development is enhanced if both parents are involved after divorce. Parents denied a significant role in the life of a child might withdraw gradually, to the detriment of the child. By ensuring that each parent has a major child care and decision-making role, as the new regime proposed by this Committee would do, shared parenting can maximize the involvement of two parents in the child's life.

Dr. John Service, Executive Director of the Canadian Psychological Association, testified that "the best solutions are, of course, those that can effect a separation and divorce with a minimum of trauma. Generous custody and access arrangements are most often in the best interests of the children and the parents." (Meeting #18)

Ester Birenzweig, of the Families in Transition Program, testified that

the children we see in our practice that seem to be more secure are the ones where the parental conflict has decreased, and where the child feels sure of the parental commitment of love for them and being there for them, regardless of where the parent is and how often this parent is seeing the child. (Meeting #17)

The various fathers' groups from across Canada all supported a presumption in favour of joint custody. Malcolm Mansfield, from Fathers Are Capable Too (FACT), summarized the thinking of most of the men's groups that appeared:

The advantages of shared parenting are that there's a win-win situation. The children will continue to be with both parents and have loving and nurturing parents. When there's a divorce, the children have more of a need for both members of the family. They have a need for more influence and more affection and love from both parents. If they have just one parent, the insecurity makes them feel stressed.... What I would like to share with you today is that there should be a continuance, a presumption of shared parenting. When sole custody is awarded and the children's father is relegated to that of the uncle dad or the Disneyland dad, the children lose... Kids don't suffer from too much parenting. They need as much love and affection from both parents as absolutely possible. (Meeting #7)

Some women's groups and mothers cautioned that a presumption in favour of joint custody might lead to its imposition in inappropriate cases and testified that in many cases, joint custody could allow an abusive father to continue to harass his wife and children. These witnesses also suggested that the main issue is not joint custody; they stated that many fathers abandon their families and do not use the access they already have to their children.

As explained in Chapter 4, the Committee is convinced that children are not served by legal presumptions in favour of either parent, or any particular parenting arrangement. In the same chapter the Committee recommends the addition to the *Divorce Act* of a series of criteria defining the best interests of the child, among which would be the principle that children benefit from consistent, meaningful contact with both parents, except in exceptional cases, such as those where violence has occurred and continues to pose a risk to the child. Whether an equal time-sharing arrangement is in the interests of a particular child would have to be determined on a case-by-case basis, with a full evaluation of the child's and parents' circumstances.

Shared parenting arrangements involving substantially equal time sharing, when agreed to by the parents through the assistance of a counselor or mediator, are often spelled out in detail in parenting plans. More elaborate than the traditional separation agreement or court order upon which many couples rely, these agreements specify where the child is to reside throughout the year, how decision-making responsibilities are to be shared by the parents, and the mechanism parents will use to deal with any disputes that arise between them. Parenting plans, while not enshrined in any Canadian custody and access legislation, are used routinely in therapeutic or negotiation settings, to help parents make decisions about parenting arrangements.

Lawyers, therapists and mediators described the benefits of this tool to the Committee. Parenting plans shift parents' focus away from labels ('I have custody, you just have access') to the schedule, activities and real needs of the child. The Committee recognizes the usefulness of parenting plans as a decision-making tool, commends them to divorcing parents and to professionals working with them, and concludes that all shared parenting orders should take the form of parenting plans. Cognizant of the disadvantages of long mandatory parenting plan forms (such as those that have to be filed in the state of Washington), the Committee cautions the Minister of Justice, in implementing these recommendations, to ensure that forms are brief and straightforward enough to be accessible and useful to parents and the professionals assisting them.

Parenting plans, especially if negotiated directly between parents or with the help of a mediator, are customized to meet the needs of a particular child and family and have the additional advantage of flexibility. Such plans can account for children's specific needs, in terms of activities and schedules, but can also provide for much-needed review as the child develops and his or her needs and interests change. Other people important to the child can be accommodated in a parenting plan, such as by scheduling time with grandparents or other extended family members, or by specifying that such contact is important and that the parents will facilitate such contact. Of course, such provisions would not apply in a case where such contact was considered contrary to the best interests of the children involved. In addition to establishing a dispute resolution mechanism to which the parents will have recourse should they be unable to settle a disagreement,

parenting plans should specify the timing and process by which parents will revisit the plan as necessary as the child matures.

In some cases, of course, parents will be unable to agree on a parenting plan either on their own or in mediation. In that event, the parents will be able to make application under the *Divorce Act* for a shared parenting determination. Judges making such determinations will be able to give consideration to proposed parenting plans filed with the court by each parent, and, guided by the "best interests of the child" test, make a court order in the form of a parenting plan. Such a plan, although judicially imposed, will retain the benefits of being focused on the child's needs and interests, as well as the advantages of flexibility and adaptability.

Recommendations

- 11. This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans.
- 12. This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans.
- 13. This Committee recommends that the Minister of Justice seek to amend the *Divorce Act* to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court.

E. Non-Adversarial Dispute Resolution

The Committee heard a great deal about the effectiveness of mediation and other forms of alternative dispute resolution in helping parents make arrangements for their children following divorce. Experts in mediation from across Canada testified about the importance of promoting this non-adversarial method of helping families restructure themselves after divorce. The benefits of mediation and other alternative dispute resolution mechanisms include reducing rather than escalating tension and conflict between divorcing parents and reducing expenses; they also have the capacity to include children and other interested parties more easily than would be the case with litigation. The growth of mediation as a forum for making parenting decisions after separation or divorce is a widespread international phenomenon. Indeed, in Australia, the 1995 Family Law Reform Act refers to mediation and arbitration as "primary dispute resolution", intending to signal that it is litigation that should be seen as "alternative".

Legislation in Québec requires that divorcing parents attend at least one information session about the benefits of mediation. If they decide to continue with mediation, they are entitled to up to six sessions paid for by the provincial government. The Québec legislation permits parties in appropriate cases, such as those with a risk or history of domestic violence, to opt out (including from the information session) by signing a release filed with the court.

Women's advocates and some mediators expressed concern about mediation in situations where there has been abuse. They believe that the abusive partner would use mediation as a forum in which to harass or overpower the other partner. These groups also testified that since violence is a common occurrence in Canadian families, mandated mediation would put many women and children at risk.

Mediation is usually inappropriate in situations of violence. Mediation is usually inappropriate in such cases because of the inequality of bargaining power in abusive relationships and because of the ongoing risk of additional abuse during the mediation process. (Martha Bailey, Queen's University, Faculty of Law, Meeting #11)

Mediators who appeared as witnesses argued that there needs to be a shift away from adversarial thinking in divorce situations. Howard Irving stated:

In the past decade, the adversarial system, especially as it pertains to family law, has increasingly been brought into question. The primary thrust of this criticism has been that the communication and compliance behaviours that are necessary if individuals are to work together as parents after they cease to be spouses are more difficult to maintain [in an adversarial forum]. In other words, a major difficulty of family law is that the problems brought by clients are frequently not legal problems; they are deep, human problems in which the law is involved. While legal problems must be resolved, their resolution does not alleviate the human problems, and, more important for the lawyer, frequently the legal problem cannot be handled properly unless the human problem is dealt with. As it is practised, adversarial divorce, with its stress on fault, retaliation, win and loss, has no positive benefit for the contestants. Such legal battles over interpersonal relationships do not provide a healthy or just atmosphere for divorcing couples and their children. (Howard Irving, University of Toronto, Faculty of Social Work, Meeting #11)

Recommendation

14. This Committee recommends that divorcing parents be encouraged to attend at least one mediation session to help them develop a parenting plan for their children. Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision making should be structured to screen for and identify family violence. Where there is a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution should be used to develop parenting plans only when the safety of the person who has been the victim of violence is assured and where the risk of violence has passed. The resulting parenting plan must focus on parental responsibilities for the children and contain measures to ensure safety and security for parents and children.

F. Widening the Circle: Involving Others with the Children of Divorce

Children whose parents are separating often feel isolated and powerless. A number of witnesses, including mental health professionals, children, grandparents and other extended family members, discussed means of including other people in the divorce process, as support or resource persons, advocates or intermediaries, on behalf of children. Some families, of course, seek professional therapeutic assistance for their children, and some may have no need for it, but many are unaware of the potential helpfulness of counselors experienced in the dynamics of parental separation and its impact on children.

The Committee listened with interest to the evidence of supports for children already present in our society, often in the form of grandparents or other extended family members. The Committee recognized the

value of this type of support in Recommendation 3, where we recommended that judges have the power to appoint interested family members or others to support children through the divorce process. Such interested third parties could be valuable sounding boards for children experiencing difficulties related to their parents' separation or divorce and could perhaps in some cases even speak on behalf of the children in court.

We need legislation to recognize the importance and value of our relationships in a child's life and development. And grandparents need to be utilized as resources, support adjuncts and placement possibilities, particularly when our grandchildren are apprehended by social services. (Annette Bruce, Orphaned Grandparents Association, Meeting #20, Calgary)

Grandparents from across Canada testified before the Committee and asked that their relationship with their grandchildren be respected in law after parents divorce. The Committee heard many painful examples of how divorce had severed a caring and loving relationship between grandparents and grandchildren. These witnesses also pointed out that grandparents often provide a child's continuing involvement with his or her heritage and that this should be honoured in law.

Some studies have shown that grandparents often provide children with a temporary residence while the parents are in conflict over custody and access. A survey carried out in 1990 in Toronto determined that of the cases referred to the Family Court Clinic, one-third of the parents and three-quarters of the children had lived in a grandparent's home during or after parental separation.³²

At present some provinces accord grandparents automatic status in child custody and access hearings. The legislative situation and the potential for law reform in the area of grandparents' rights to apply for custody or access are discussed fully in Chapter 4. It should be noted that grandparents' groups were not asking for equal status with the child's parents in terms of custody and access. They were asking only that the courts respect the grandparent/grandchild relationship as special and significant and that access be facilitated.

Why should grandparents have access? It is a well known fact that there is mutual attraction and rapport between the young and the old, and this is especially true between grandchildren and their grandparents. One of the many advantages to the children from interaction with their grandparents includes emotional support in a stable, secure environment, and this is most important. Often, it does include financial support as well. Unconditional love is given freely and a sympathetic ear is provided to hear the children's fears and their frustrations and their needs. (Irma Luyken, Waterloo Branch, Association to Reunite Grandparents and Families, Meeting #9)

The Committee also encourages parents contemplating separation or divorce to avail themselves of the resources available in their communities and the extensive literature available in libraries and bookstores to help them achieve the optimal outcomes for their children. Given the number of families experiencing separation and divorce in Canada and throughout the western world, no family — and no child — should feel as though they are the only ones experiencing the upheaval of divorce.

³² C. Wilks and C. Melville, "Grandparents in Custody and Access Disputes" *Journal of Divorce*, Vol. 1 (1990), cited by Jeanette Mather, Honorary Member G.R.A.N.D. Society, Ottawa Chapter, Meeting #9.

CHAPTER 3: Models from Other Jurisdictions

Recognizing that Canadians are not alone in wanting to improve decision making about parenting arrangements after divorce, the Committee undertook to study custody/access legislation and practice in several jurisdictions outside Canada. Some other examples were brought to the Committee by witnesses. Here the Committee reviews the four foreign models about which evidence was received from experts working in those jurisdictions: Australia, the United Kingdom, and the states of Michigan and Washington.

A. Australia

Australia's most significant family law reform since 1975 came about through the adoption of the Family Law Reform Act 1995 (referred to as the "Reform Act"), most of which came into force on 11 June 1996. The new law, which amended the Family Law Act 1975, introduced the new notions of "parental responsibility", "residence" and "contact" orders, replacing the previous concepts of guardianship, custody and access. The terminology change was inspired by the example of the Children Act 1989, adopted in the United Kingdom. As Regina Graycar, Professor of Law at the University of Sydney, told the Committee:

It seemed to be fairly widely agreed that the set of aims that were adopted came largely from looking at the English legislation, and the aims were very much to encourage both parents to be involved in the care of their children after separation: to reduce disputes between parents by removing the notion of winner takes all that some people associate with the language of custody and access; to emphasize the rights of children over the rights or needs of parents; to encourage private agreement and private ordering and increase the use of what's now called "primary dispute resolution"—we've abolished the word "alternative" and [mediation] is the primary form of dispute resolution; and, finally, to ensure that contact or access wouldn't expose people to a risk of violence and to ensure that violence was a factor taken into account in determining what was in the best interests of children. (Meeting #35)

The Reform Act contains a statement of objects and principles drawn from the UN Convention on the Rights of the Child. It also replaced the legal concepts of custody and guardianship with that of "parental responsibility". Both parents have parental responsibility for their child(ren) and do not lose it if the nature of their relationship with each other changes. Each parent may exercise the full range of parental responsibility independently of the other, unless restricted by a "specific issues order". Parental responsibility is defined to include "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".³³

The notion of parental responsibility covers the types of duties included in the concept of custody and includes discipline, religion, education, medical treatment, property, and naming of a child. These are not listed in the legislation. A parent can be excluded from parental responsibility in general, or from a particular aspect of parental responsibility, by a specific issues order.³⁴ In addition to specific issues orders, the Reform Act creates three other types of parenting orders that can be made by a court:

(1) residence orders, dealing with where the child is to reside;

³³ Family Law Reform Act 1995, No. 167 of 1995, SECT 31, section 61B.

- (2) contact orders, specifying when the child will be with the other parent; and
- (3) child maintenance orders.

Professor Graycar also informed the Committee about the preliminary results of her research, conducted in conjunction with the Family Court of Australia, to assess the effects of the changes. At this early stage, there is a wide range of views about the degree to which the new language of the act is having a real impact on parenting arrangements after divorce, but there seems to be no increase in the amount of time non-residential fathers are spending with children. There may have been an increase in the courts giving parents contact (or access) in cases where it might previously have been denied. Also, the legislative changes occurred at the same time as a dramatic reduction in the availability of civil legal aid, and researchers are having difficulty separating the effects of that change from those of the legislative reform.

One of the key differences between Australia and several other jurisdictions the Committee considered, including Canada, is that a single national court deals with family law matters, and that court combines its legal role with an extensive therapeutic arm. The counsellors affiliated with the court are available to the public at relatively low cost, and as Professor Graycar indicated, are particularly effective in dealing with parenting disputes, such as those involving the exercise or denial of access. The presence of the Family Court's non-legal services has often been cited as a major distinction between Australia and the United Kingdom in comparisons between the two countries' new family law.

B. United Kingdom

The United Kingdom's *Children Act 1989* is a comprehensive law bringing together and simplifying several child-related laws. The act integrated laws dealing with private custody and access matters, child protection and other public obligations toward children. It was intended to strike a new balance between family autonomy and the protection of children.³⁵ The act starts from the premise that children are best provided for by their parents, with little or no court involvement. The new concept of "parental responsibility" is defined to sum up the collection of rights, duties, powers, responsibilities and authority that a parent has in respect of a child.³⁶ In both Australia and the UK, parental responsibility continues regardless of the status of the parents' relationship with each other. Unlike the Australian statute, however, the UK act includes a reference to parents' "rights".

The concept of parental responsibility was described to the Committee by Janet Walker, of the Relate Centre in England, who is also a board member of the Canadian Research Institute for Law and the Family:

The term we're using is "joint parental responsibility", and at the point of separation or divorce, because, of course, it applies to unmarried parents as well as to those who are married and divorcing, the parents are reminded of what those joint parental responsibilities are, and the expectation is that they will indeed consult about making decisions in a child's life. However, we also have the concept that responsibility for day-to-day decision-making runs with the child. So given that the child might be with mother at any moment in time, mother takes responsibility for day-to-day decisions. When the child is with father, father takes the responsibility for day-to-day decisions. The big decisions are supposed to be discussed jointly. (Meeting #20, Calgary)

³⁴ Section 61C.

³⁵ UK Department of Health, "An Introduction to The Children Act 1989", (London: HMSO, 1989), p. iii.

³⁶ Children Act 1989 (1989, c. 41), section 3.

Adopting the concept of parental responsibility was intended to contribute to attitudinal change, so that parents would not see parenting as a question of their own rights, but as a privilege carrying obligations. It was hoped that the competitive "winner take all" character of these disputes might be reduced. One difference in the UK model is that the act makes clear that one parent can act unilaterally in exercising parental responsibility, without consulting the other, so long as no court order is infringed.³⁷ Janet Walker alluded to the beneficial impact of the new terminology.

There is quite a lot of research evidence in England now around the changes we've made in the policy field in trying to help parents deal with the difficulties of what we now call "residence and contact". I think we've been fairly successful in taking a lot of the heat out of the battles and the arguments through our legislation. (Meeting #20)

The Children Act 1989 provides for parenting orders, including "contact orders", "residence orders", "specific issues orders", and "prohibited steps orders". The latter are orders that prohibit a parent from taking any specified step in meeting his or her parental responsibility for a child, without the consent of the court. The legislation expresses a preference for the less interventionist types of parenting orders. The making of specific issues and prohibited steps orders is restricted by section 9(5) of the act if the same result could be reached by making a residence or contact order. In addition to restricting the court's power to make parenting orders, section 1(5) directs the courts to make a parenting order only if it can be demonstrated that to do so would be better for the child than not doing so.

C. Michigan

Under the Michigan *Child Custody Act of 1970*, issues of custody and "parenting time" (the equivalent of "access" under the *Divorce Act*) are to be resolved according to the best interests of the child. ³⁹ Section 3 of the act sets out a series of factors that must be considered by the court in determining the child's best interests, including some of the same types of criteria used in some provincial family law and in case law in Canada. These include the emotional ties between the child and the parties; the length of time the child has lived in a stable environment; the preference of the child, if he or she is old enough to express it; and the willingness of the parties to facilitate a close relationship between the child and the other parent. Also, the presence of domestic violence must be considered, regardless of whether it was witnessed by or directed at the child.

The act encourages parents to consider joint custody when making parenting arrangements and requires that parents in a custody dispute be advised of the joint custody option. ⁴⁰ If either parent requests joint custody, the court must consider it and state on the record the reasons for granting or denying it. In deciding whether to award joint legal or physical custody, the court must consider the best interests criteria set out in section 3 and whether the parents will be able to co-operate in decision making about the child. When joint custody has been awarded, each parent has decision-making authority regarding routine matters while the child is resident with him or her.

In addition to assigning custody to one or both parents, the court may provide for reasonable parenting time for the parents, grandparents or others. Parenting time is to be granted in accordance with the child's best interests, although it is presumed to be in the child's best interests to have a strong relationship with both

³⁷ Children Act 1989, section 2(7).

³⁸ Section 8, Children Act 1989.

³⁹ Child Custody Act of 1970, MCL ACT.1970.91, 722.25, section 5.

⁴⁰ Section 6a.

parents.⁴¹ Also, the section makes parenting time with each parent the child's right, unless there is clear and convincing evidence that it would endanger the child's physical, mental or emotional health.

Recently, after extensive public hearings into concerns about child custody law, Michigan has restructured its approach. The hearings produced little or no consensus in terms of where improvements should be made, but Michigan proceeded to combine its previously separate judicial arrangements for divorce law and juvenile delinquency into a Family Division of the state's Circuit Court. The new Family Division was created by the state legislature in 1996 and took effect 1 January 1998. The legislation left it open to each county in the state to develop its own approach to family court operations.

Judge John Kirkendall, of the Washtenaw County Trial Court in Ann Arbor, Michigan, described the advantages of the unified court for divorcing couples and their children.

We have been [operating as a family division of the Circuit Court] now for about two years, and we have learned some things from this experience. One thing we have learned is that we are able to act more efficiently, more knowledgeably, and more quickly in handling family issues. As a court, when we're able to see one family before us with all these problems, we're able to give more consistent treatment to that family than that family would receive if it went to a variety of courts. (Meeting #26)

A division of the Circuit Court in each part of the state is called the Friend of the Court. This office is responsible for investigating and making recommendations to courts on child custody, parenting time and support matters, and also for initiating the enforcement of orders dealing with these matters. As Social workers employed by the Friend of the Court office provide support to divorce judges by doing custody/parenting time assessments. If the parties are unhappy with the social worker's recommendation, they are entitled to a conciliation hearing, failing which the third step is a trial. Friend of the Court workers are also involved in child protection matters, where they take a more proactive role as advocates for children.

The Friend of the Court office is involved in enforcing parenting time orders. If the office is convinced that the order has been violated, it applies the local make-up parenting time policy (each court is required to have one). The office can also schedule a contempt of court hearing, at which the defaulting parent must show "good cause" why the parenting time order was not obeyed, or apply to the court to change the order. The Circuit Court can also suspend occupational or driver's licences for violations of parenting time orders. The Friend of the Court's enforcement role, backed up by the courts, was described to the Committee by Thomas Darnton, Visiting Professor of Law at the University of Michigan Child Advocacy Clinic:

If there is an established schedule and there is a deviation from that schedule, they have a hearing process. Again, these are informal. Lawyers are frequently not involved. This is where the "friend of the court" officer will examine what the reasons were behind the particular problem that came up, will order make-up visitation if that's appropriate, and will recommend changes in the schedule. There are various options, beginning with changing orders and requiring make-up time, to financial penalties or recommendations for jail time for the parents if the order is not followed. Now, referees can't put people in jail, only judges can do that. It really doesn't come up very often that people are faced with that sort of a sanction. (Meeting #26)

⁴¹ Section 7a.

⁴² Michigan Supreme Court, FAQ, "Family Issues", available on-line at http://www.supremecourt.state.mi.us/faq/ faqfam.htm.

⁴³ Michigan Supreme Court, FAQ, "Public Programs: Friend of the Court — Enforcement of Domestic Relations Orders", available on-line at http://www.supremecourt.state.mi.us/pubprog/focb/brochure/enforce.htm.

D. Washington

With the passage of its *Parenting Act* in 1987, Washington was the first of several states to adopt a parenting plan system. ⁴⁴ The *Parenting Act* did away with the terms "custody" and "visitation", substituting the concept of "residential placement". ⁴⁵ Legislators intended the change of language to shift the focus away from the sometimes acrimonious battle between parents and onto the more important matter of ensuring the best possible parenting arrangements for children. Many witnesses cited the Washington model with approval, but not all had a detailed understanding of what the legislation entails. For example, some understood the legislation to presume or mandate shared parenting, which it does not.

The basic mechanism for spelling out post-separation parenting arrangements is the parenting plan. All parents separating in Washington must complete detailed temporary and permanent parenting plans. A plan has three parts: a residential schedule; decision-making allocation; and a dispute resolution mechanism. Thinking through the children's post-separation arrangements is intended to help parents develop an understanding of children's complex needs and the importance of co-operating with the other parent in decision making. The long parenting plan forms that have to be filled out make sure that parents consider an extensive list of practical matters to meet the children's needs. The residential schedule must indicate at which parent's home the child will live on given days of the year.

Although it is hoped that the parties will arrive at the terms of the parenting plan by agreement, in the event that they cannot agree, the statute sets out criteria courts can use to impose a parenting plan. The residential provisions must encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's socio-economic circumstances. However, a parent's residential time with a child must be limited if the parent has engaged in any of the following behaviours: wilful abandonment of the child; physical, sexual or emotional abuse of a child; domestic violence or sexual assault; or conviction for one of several other specified sexual offences.

The Washington law does not refer to joint custody or shared parenting, nor does it create any presumption about the desirability of such an arrangement. Shared parenting under a parenting plan is possible and can even be imposed by a court if to do so would be in a child's best interests.

Any matter can be sent for mediation of the contested issues before or at the same time as the matter is to be heard, unless one of the parties cannot contribute to the cost or would be placed at risk emotionally or physically. There is provision in the legislation for the court to appoint an attorney to represent the interests of a child in proceedings dealing with any aspect of a parenting plan in a marriage dissolution or legal separation matter between the child's parents. ⁴⁶ The court will order one or both parents to pay the legal expenses of the child's attorney.

Gene Oliver, a Seattle lawyer specializing in child abduction cases, told the committee that the *Parenting Act* had succeeded in reducing the acrimony in most child-related proceedings. Its advantage is that it shifts the focus from "ownership" of the child to the concrete tasks of parenting, such as scheduling, decision making, and so on. However, the voluminous detail required on parenting plan forms has increased the cost and time required for most such proceedings; most parents would have been able to settle their affairs amicably without incurring the expense of preparing parenting plans.

⁴⁴ More information about the Washington legislation can be found in the Library of Parliament paper entitled "Child Custody and Access Law: Some Models from Other Jurisdictions", 18 February 1998.

⁴⁵ Family Law Advisor, Frequently Asked Questions: "Washington Parenting Plan FAQs", p. 1, available on-line at http:///www.divorcenet.com/wa/wa-faq04.html.

⁴⁶ Section 26.09.110.

The parenting plan is pretty complicated to prepare and there's a lot of detail in it. For those people who don't need it, it's a lot of extra time and money, and sometimes it raises issues that they would be pretty well able to deal with if they had to deal with them as they came up, but when you put them in an abstract sense and sit them down at a table and say they have to agree on this before they get their divorce done, it causes problems. (Meeting #19, Vancouver)

Dr. John Dunne, a psychiatrist and a member of the committee that drafted the *Parenting Act*, is researching the impact of the legislation. Early results show that the drafters' objectives for the new law have not been realized, and it has had a negative impact on parents' post-divorce adjustment. Neither parents nor children were better off under the new legislation.

The *Parenting Act* basically requires people to get divorced twice. They have to do a temporary parenting plan, which often becomes quite litigious and takes several months to work out, and then they have to turn right around and start developing a permanent parenting plan. I think that accounts for a good deal of the anxiety that the parents were experiencing under the new law that they didn't have under the old. (Meeting #19, Vancouver)

Dr. Diane Lye has been commissioned by the Washington Supreme Court to undertake a major research project to evaluate the impact of the *Parenting Act*. She distinguished between the impact of the act on more affluent parents, who have the time and money to meet with experts and develop plans that really meet their needs, and its impact on low-income people, for whom the legislation poses a particular disadvantage.

Low-income people, immigrant people, or people for whom English is not their first language are often said to be disadvantaged by the system because they cannot afford either the time or the money to get the services they need to make the system work for them. (Meeting #19, Vancouver)

CHAPTER 4: Federal and Provincial Government Roles

This Committee recognizes and underlines the important distinction between federal and provincial/territorial government roles in the area of family law and its many associated services. Committee Members were aware throughout the study that many of the matters brought to their attention by witnesses related to areas of jurisdiction outside federal competence. To do justice to the subject matter and the tremendous expertise and experience offered by witnesses, Members considered it important to report on all potential areas for action. Nonetheless, every effort has been made to identify the level of government with responsibility and authority in each sphere and to indicate in particular areas where governments will be called upon to work together to implement much needed change.

A. The Federal Government

1. The Divorce Act

(i) No Presumptions

The key piece of legislation discussed at the Committee's hearings was of course the *Divorce Act*. A number of witnesses reported that the current *Divorce Act* provisions on child custody and access provide a useful framework for decision making. Many of the reports received about the unsatisfactory nature of custody and access decision making in the current legal regime related to matters other than the wording of the law. Still, there were a number of recommendations advocating change in various provisions of the act or its overall approach.

One of the most frequent recommendations was that the *Divorce Act* be amended to add a legal presumption to help parents and judges make decisions about parenting arrangements. Many women's groups and individual women advocated strongly that the act should contain a presumption in favour of the primary caregiver of children, as this would best reflect the pattern whereby women perform most of the functions associated with caring for children in intact families. This is an approach often followed by Canadian courts, in the absence of a legislated presumption. As law professor Susan Boyd informed the Committee:

The studies are clear that mothers are still primary caregivers in the vast majority of intact families and also after divorce. Even when mothers are employed outside the home, they spend roughly double the time on child care that employed fathers do. These studies [Women in Canada, Statistics Canada, and Women Count, published by the Province of British Columbia] basically show us that the majority of fathers do not share child care equally. (Ad Hoc Committee on Custody and Access Reform, Meeting #27, Vancouver)

An emphasis on parenting arrangements during marriage reflects the view often expressed by Canadian courts that disruption of the children's lives should be minimized and that stability can be promoted by replicating the parenting roles adopted during the marriage as closely as possible after separation. However, mediator Howard Irving warned against disqualifying fathers from real participation in parenting on the basis of the division of labour to which the parties agreed voluntarily during the marriage.

I do not think it should be looked at in terms of this notion of primary caregiver. In fact, that notion bothers me. Many fathers and mothers decided at the time they were married, before they had children, that one would be an at-home parent and the other one would be the working parent outside the home. That was their decision and it was mutual. ... The point is that there is a decision made between the parents. Is it right after marriage to punish a parent because they cannot get the frequency in terms of the hours or minutes spent with a child when in fact he or she — the gender does not matter — may have a very close emotional bond with that child? I would advocate for the quality of the relationship and not the frequency of the minutes and the hours some people are counting. (Meeting #11)

On the other hand, many witnesses, including individual fathers, fathers' groups and shared parenting advocates, recommended strongly that the act be amended to include a presumption in favour of joint physical custody, meaning an arrangement in which children would spend roughly equal amounts of time with each parent and where decision making would also be shared. Its proponents argued that such a presumption would be the best means of levelling the playing field or overcoming any unfair advantage women might have in disputes about parenting arrangements because of gender bias. Others thought it would increase the significance of the parenting roles played by fathers after divorce, to the ultimate advantage of their children.

The Committee was interested in testimony about the benefits of joint custody, for both parents and children, when it is agreed to voluntarily and works effectively. This type of arrangement generally involves joint decision making by parents, at least respecting important issues such as schooling, religion and medical care, with significant periods of time spent in the care of each parent. There seems to be at least anecdotal evidence to the effect that, with sufficiently mature children, willing parents, and conducive economic circumstances, joint custody offers benefits to children. However, legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles.

Presumptions in favour of joint custody or the primary caregiver have been adopted in a number of U.S. jurisdictions, but in some cases legislatures have subsequently withdrawn them after finding that they were not having the intended desirable effects. Presumptions that any one form of parenting arrangement is going to be in the best interests of all children could obscure the significant differences between families. As Edward Kruk, a professor of social work, warned:

First, because there is so much variation in our society in the way women and men enact their parental roles, any form of "one shoe fits all" approach to child custody, whether that's a joint custody or a primary caretaker presumption, is problematic. Research tells us that children fare best within an arrangement that attempts to approximate as closely as possible the parent-child relationships in the original two-parent home, within as co-operative an atmosphere as possible between the parents. (Meeting #27, Vancouver)

Members of the Committee were warned that advancing any form of presumptive model for parenting after divorce would conflict with the best interests of children. Fundamentally, there is too much variation among families for either presumption to offer a benefit to the aggregate of Canadian children.

In the past, there have been suggestions that a presumption in favour of the primary caregiver or in favour of joint custody would be beneficial. We disagree. It is our view that the courts must retain the discretion to deal with the unique facts of each case. Relying upon a presumption will not assist, whether the presumption is based upon the status quo prior to separation or based upon assuming that parents are equally willing or capable of meeting the needs of their children. In particular, a presumption in favour of joint custody is a presumption in favour of a legal concept, which is extremely elastic. This lack of definition of joint custody is, in our view, sufficient to make such a presumption fruitless. (Angus Schurman, Lawyer, Meeting #30, Halifax)

Presumptions can also have the negative effect of compelling families who might otherwise have been able to make constructive, amicable arrangements to apply to a court if they want to avoid the application of the presumptive form of parenting arrangements. The Committee was asked to consider this unintended consequence by lawyer Daphne Dumont.

Please do not establish presumptions that will require parents to go to court. Under no circumstances should the federal government establish presumptions that custodial parents must rebut in order to protect their children. Custodial parents tend to be poorer than non-custodial parents, particularly before the child support starts to flow, and it rarely flows early. The need to agree on the terms of access in order for access to occur is a great encourager of agreement. If you impose some sort of 50-50 parenting time arrangement, we will lose that benefit. (Meeting #31, Charlottetown)

On the basis of this argument, a number of witnesses concluded that the *Divorce Act* should not be amended to include any presumption in favour of a particular type of parenting arrangement. Instead, they suggested strengthening the "best interests of the child" test, which is the current basis for custody and access decisions. In addition, it was argued that families would benefit from the expanded availability of non-litigation services to give divorcing couples better information about their options. With more resources and better information, parents would be able to promote the best possible outcomes for their own children through their post-separation behaviour and decision making. As lawyer Michael Cochrane pointed out to the Committee:

I think what we really need to have, rather than presumptions of joint custody, which I do not favour, is a much more sophisticated shopping list, one that the judge is aware of and the lawyers and clients are discussing. From that more sophisticated list of choices and with informed consumers, we will get better parenting plans and we'll get people asking for things they know they're entitled to, rather than lying down at the wrong moment in a case and not taking what's really in their interest or the child's interest. (Meeting #13)

(ii) Best Interests of the Child

Many witnesses emphasized the importance of the "best interests of the child" test, set out in section 16(8) of the *Divorce Act*, declaring that it is the only test that is sufficiently broad, flexible and discretionary to allow courts to consider fully the individual circumstances of children in parenting disputes. However, others criticized the test as being too imprecise to give real guidance to separating parents. The concept of the best interests of the child is used widely, in Canada and elsewhere, and is therefore recognized, at least to some extent. Every provincial family law in Canada refers to the welfare or best interests of the child as the primary criterion for custody and access decisions, ⁴⁷ and the expression can be found in the statutes of many other jurisdictions, as well as several international treaties.

A number of witnesses recommended that the *Divorce Act* be amended to include a list of criteria or a definition of the best interests of the child, to guide judges and parents applying the test. Without being exhaustive, such a list would set out all matters decision makers should consider. Some children's circumstances might necessitate consideration of factors other than those listed in the legislation. The presence of a list of guiding criteria would improve the predictability of results and encourage consideration of factors considered particularly important to the well-being of the child.

⁴⁷ The "best interests of the child" test is found in the custody and access legislation in all common-law Canadian jurisdictions except Alberta, the Northwest Territories and Nova Scotia, where the roughly synonymous expression "welfare of the child" is used. The Québec *Civil Code* uses the expression "in light of the child's interest and the respect of his rights" (Article 33).

Witnesses had a variety of suggestions about what should be included in a list of criteria for the best interests of the child.

One [key objective] is to provide security, stability, and nurturance, as exemplified by warm, affectionate, and responsive parent-child relationships.

The second would be effective parenting that's free from psychological disturbance and substance abuse.

The third would be to reduce or eliminate parent conflict and exposure to violence.

Fourth is that parents make timely decisions about children.

Fifth is that there be particular support and specialized services for children in high-conflict families. We see them as a much needier group than the general population of children in divorcing families.

Sixth is that there be special provisions for parenting plans if violence continues, and that we have protections for children. (Rhonda Freeman, Families in Transition, Meeting #17)

I would like to see the legislation changed so that [judges] must direct their mind to family violence. I would like to see added to subsection 16(9) of the *Divorce Act* the phrase "Family violence shall be considered conduct relevant to the ability to act as a parent of the child". (Eve Roberts, Lawyer, Meeting #29, St. John's)

One of the criteria I thought should be added, which doesn't [currently] exist, has to do with the children, and that is the adaptability or adjustment of the child to the proposed parenting plans. In other words, children differ not only in terms of age but even within an age group as to their ability to adapt to various changes in their environments, and one plan does not fit all. (Gary Austin, Psychologist, Consultant, London Family Court Clinic, Meeting #18)

Elaine Rabinowitz, a member of the Prince Edward Island Provincial Child Sexual Abuse Advisory Committee, articulated a series of principles that should be included in the definition of best interests of the child, including (1) the child's developmental needs; (2) continuity of care; (3) continuity of relationships with both parents; (4) the least detrimental alternative; and (5) the family context.

The National Family Law Section of the Canadian Bar Association recommended that criteria similar to those set out in Ontario's *Children's Law Reform Act*, as amended to reflect any new terminology adopted in the federal legislation, be enumerated in the *Divorce Act*. Their recommended list contains several items in addition to those in the Ontario act, including the following:

- the caregiving role assumed by each person applying for custody during the child's life;
- any past history of family violence perpetrated by any party applying for custody or access;
- the child's established cultural ties and religious affiliation; and
- the importance and benefit to the child of having an ongoing relationship with his or her parents. 48

Recommendations

15. This Committee recommends that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the "best interests of the child".

National Family Law Section, Canadian Bar Association, Brief, "Custody and Access Review", May 1998, pp. 4-5.

- 16. The Committee recommends that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child, and that list shall include:
 - 16.1 The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
 - 16.2 The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
 - 16.3 The views of the child, where such views can reasonably be ascertained;
 - 16.4 The ability and willingness of each applicant to provide the child with guidance and education, the necessaries of life and any special needs of the child;
 - 16.5 The child's cultural ties and religious affiliation;
 - 16.6 The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
 - 16.7 The importance of relationships between the child and the child's siblings, grandparents and other extended family members;
 - 16.8 The parenting plans proposed by the parents;
 - 16.9 The ability of the child to adjust to the proposed parenting plans;
 - 16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
 - 16.11 Any proven history of family violence perpetrated by any party applying for a parenting order:
 - 16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;
 - 16.13 The willingness shown by each parent to attend the required education session; and
 - 16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute.

(iii) Official Languages

Concern about access to court services in the language of their choice by those engaged in litigation under the *Divorce Act* led the Committee to consider the application of the *Official Languages Act* to divorce proceedings. The use of English and French in the judicial system is governed generally by a number of constitutional provisions that apply to certain courts. The use of both languages in the federal courts is guaranteed by the *Constitution Act*, 1867 and the *Canadian Charter of Rights and Freedoms*, but divorces are heard before provincially administered courts, to which no such language rights apply consistently. Only in

New Brunswick, Québec and Manitoba are the parties' right to proceedings in either language constitutionally protected. The Committee agrees that, as the *Divorce Act* governs all divorces in Canada, and Canadians whose preferred language is either French or English are found across the country, divorce-related judicial services in both languages should be available nationwide.

In November 1995, the Commissioner of Official Languages released a report dealing with the use of French and English in Canadian courts. ⁴⁹ That report reviewed the constitutional framework protecting the use of both official languages in the judicial system, the use of both languages in criminal courts, and the use of both languages in the civil courts. The report noted that language rights have been expanded significantly in criminal matters, even though such matters are also heard in provincially administered courts. Section 530.1 of the *Criminal Code of Canada* provides specifically that accused persons have the right to be tried in the official language of their choice. Accused persons also have the right to have a lawyer, prosecutor and judge who speak the official language of their choice. Transcripts of proceedings and written judgements must be provided in the language chosen by the accused. To implement these language rights, the federal government has provided funding for language training for judges in an effort to increase the number of judges capable of conducting trials in both official languages.

The Official Languages Act does not apply to administration of the Divorce Act by provincial courts. In the three provinces where there is constitutional protection for minority language rights, judicial services are available in both official languages. In the remaining seven provinces, as noted by the Commissioner of Official Languages, the provision of services in the minority languages — French — varies from province to province, as well as within provinces. The federal government has no legislative authority over matters of civil procedure before provincially constituted courts, but the federal Cabinet does have exclusive authority to appoint judges to courts hearing divorce matters. In exercising its power of judicial appointment, the federal government could provide for the use of both English and French in proceedings before certain courts. As the expansion of unified family courts proceeds across Canada, this Committee is of the view that appointments to those courts should be of bilingual judges to the fullest extent possible.

Canadians involved in divorce litigation should be able to use court services in the official language of their choice across Canada. To this end, the Committee has concluded that the *Divorce Act* should be amended to specify the right of parties to a divorce to have their proceedings go ahead in the official language of their choice. These amendments should be modelled on the language rights provisions in section 530.1 of the *Criminal Code*.

Recommendation

17. This Committee recommends that the *Divorce Act* be amended to ensure that parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages.

(iv) Parenting Survives Divorce

Among the key points made by witnesses, and one with which Members had considerable sympathy, was the concept that parental relationships survive divorce and should in no way depend on a continued marital relationship between parents. Some of this thinking was reflected in testimony about the unsuitability

⁴⁹ Commissioner of Official Languages, The Equitable Use of English and French Before the Courts in Canada, November 1995.

of the language of the *Divorce Act*, but it extended to a desire for a profound reorientation of the legislation. Many witnesses stressed that divorcing parents are not divorcing their children and that their continued parental role and relationship should not be obscured by the application of *Divorce Act* provisions to their situation. As lawyer Christian Tacit argued:

I believe it's important for this Committee to take into account the fact that parents are parents before separation and divorce and they continue to be parents after separation and divorce. Nothing in divorce, in and of itself, disentitles a parent to the inherent rights they have as a parent, and there is no reason for the state to interfere with that or to make presumptions contrary to that unless the conduct of a parent is such that it would otherwise invite the child welfare authorities or the criminal system. (Meeting #34)

The new *Divorce Act* regime recommended by the Committee and the change in legislative terminology from "custody" and "access" to "shared parenting" (see Recommendation 5) are designed to ensure that parental relationships survive divorce. The premise is similar to the Québec *Civil Code* provision that parents, regardless of their marital status, have joint parental authority with respect to their children. ⁵⁰ This regime differs significantly from the one in place in the common-law provinces.

When the Court grants one of the parents sole custody of a child without providing any other indication in the judgement, that does not affect joint parental authority, except in the small everyday decisions which are obviously up to the parent who has the child with him or her on a daily basis. In the same way as the custodial parent makes these decisions when the child is with him or her, the "non-custodial" parent makes those decisions when exercising his or her right of access, visiting right and right to take the child on an outing. (Dominique Goubau, Barreau du Québec, Meeting #4)

The Australian Family Law Reform Act sets out, as the first of four principles underlying the act, that "children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together".⁵¹ The act also provides that "Each of the parents of a child who is not 18 has parental responsibility for the child".⁵² This provision is expressly of effect "despite any changes in the nature of the relationships of the child's parents", ⁵³ such as separation or remarriage.

(v) The Federal Child Support Guidelines

One of the most frequently mentioned sources of dissatisfaction with the legal mechanism for dividing financial and other responsibilities between parents after separation and divorce was the Federal Child Support Guidelines. These guidelines have been in place since 1 May 1997, having come about as a result of the passage of Bill C-41, which amended the *Divorce Act* and two other federal statutes. The new provisions created the Federal Child Support Guidelines, which are regulations under the act, and strengthened federal legislative measures dealing with the enforcement of child support obligations. The guidelines came into force at the same time as the tax treatment of child support was changed so that child support payments are no longer taxable in the hands of the recipient, usually the custodial parent, or deductible by the payor, ⁵⁴ usually the non-custodial parent.

Article 600 of the Québec Civil Code reads, "The father and mother exercise parental authority together. If either parent dies, is deprived of parental authority or is unable to express his or her will, parental authority is exercised by the other parent."

⁵¹ Section 60B(2).

⁵² Section 61C(1).

⁵³ Section 61C(2).

The guidelines have created conflict in many cases where there had been none: cases long settled were reopened by virtue of the provision that made the existence of the guidelines sufficient to entitle a support recipient to apply to vary the amount of child support being paid. For newly separated parents, the guidelines seem unfair in their exclusive focus on the income of the payor parent. Ottawa lawyer Christian Tacit identified the range of concerns brought to the Committee by many of the non-custodial fathers who testified.

The Federal Child Support Guidelines, as currently enacted, are an invitation for litigation on custody and access, pure and simple: first of all, the 40% threshold on access, before the needs and circumstances of parties are taken into account, as opposed to just looking to the tables; second, the presumption that people, after separation and divorce, after they've borne the financial devastation, can just look to the tables without taking into account expenses; third, the fact that the undue hardship test uses a means ratio test that is totally unrealistic, again having regard to the costs that parties bear after divorce and separation. So there are serious problems here. (Meeting #34)

The Committee notes that the Standing Senate Committee on Social Affairs, Science and Technology recently issued an Interim Report, dated June 1998, which makes a series of recommendations for the improvement of the guidelines. This Committee heard evidence about some of the matters dealt with in that report and appreciates and commends the work of that Committee. The Committee believes that concerns raised by witnesses will add to the body of evidence gathered by the Senate Committee and should be given serious consideration as implementation and monitoring of the guidelines continue.

The Federal Child Support Guidelines are generally recognized as having contributed in a positive way to improving predictability with regard to the amount (or "quantum") of child support and to reducing the incentive to argue or litigate over the issue of quantum. However, this was seen as inadequate justification for the extent to which they have increased the conflict between divorcing couples in a number of ways. One of the contentious issues (which was not the direct result of changes stemming from Bill C-41, but was nevertheless part of the controversy around that bill and remains unchanged) relates to the definition of "child of the marriage" in the *Divorce Act*, which has been interpreted judicially to include children over the age of majority (sometimes into their 20s) if they are engaged in post-secondary education. The effect of this judicially established rule has often been to compell non-custodial parents to pay for their children to attend post-secondary institutions, even though parents in intact families obviously are not required to do so.

Non-custodial parents' and fathers' groups that testified before the Committee often raised this issue, especially in relation to the perceived unfairness of this financial obligation in cases where there was little or no contact between the paying parent and the child. It often has a major impact on the payor's ability to meet financial obligations to the children of second or subsequent relationships. It was also seen as an unfair restriction on the non-residential parent's discretion to choose where to devote financial resources.

Divorced parents are not entitled to the same choices in their parenting that non-divorced parents take for granted. Divorced parents can be forced to pay the post-secondary education costs of their adult children. Unlike their non-divorced counterparts, the financial obligations of the divorced parents to their children do not end when their children reach the age of majority. (Cynthia Marchildon, Meeting #13, Toronto)

Many presenters asked that the *Divorce Act* be amended to provide that the definition of "the child of the marriage" not include children above the age of majority who are engaged in post-secondary education, save

⁵⁴ In family law, the payer of child or spousal support is generally referred to as the "payor".

and except those with disabilities or identified as having "special needs". Alternatively, it was suggested by a number of witnesses that the guidelines should allow support payments for such children to be paid directly to the student or to the educational institution. The opposing argument is that children whose parents have divorced often suffer a disadvantage with respect to the financing of post-secondary education. Without a full-scale examination of the topic, given that it was outside the strict mandate of the Committee, Members wish to highlight the issue and raise it for further discussion, but also to emphasize the counter-argument — that children whose parents have divorced will be less likely to be able to continue their education if the definition of "child of the marriage" is changed. As Professor Bala argued:

Children of divorce find it extremely difficult to pursue post-secondary education. I think having a legal regime there is extremely important. If you would like to amend it so that the money can go directly to the adult child, I think there would be much to be said for that. Indeed, how some judges interpret the legislation has seen them make orders that way already. If you want to clarify the law for people and put that in it, I think that might well be appropriate. I would very strongly urge you not to eliminate that obligation, however, but to simply redefine it. (Meeting #6)

Another of the concerns raised with respect to the Federal Child Support Guidelines is the so-called 40% rule: the section of the Guidelines that provides that where the payor exercises rights of access to, or has custody of, the child for at least 40% of the time in a given year, the quantum of child support is not determined solely on the basis of the amount set out in the table.⁵⁵ In such cases, the court will have regard to the table amount, the increased costs associated with the shared custody arrangement, and the conditions, means and other circumstances of the parents and the child. This very contentious provision was intended to give legal recognition to the increased costs borne by a non-residential parent who spends a large amount of time caring for the child. As a number of witnesses said, the rule has had the unfortunate effect of encouraging parents, who might otherwise have agreed, to fight over the residential schedule for the child.⁵⁶

The Act's use of the 40% rule actively, if inadvertently, interferes with the first principle [that two competent parents should share responsibility for their child]. It does this by attaching a financial incentive to the parents' shared responsibility of care. As it now stands, resident parents, typically mothers, are encouraged to prevent parenting involvement of the non-resident parent from exceeding 40% of the time, thus making the latter wholly responsible for child support. This holds even when resident parents have higher net earnings than non-resident parents do. Non-resident parents, typically fathers, are encouraged to seek greater parenting involvement, whether they really want it or are prepared for it, in order to escape the burden of sole support. I can tell you that in my practice over the last year or so, I have never had so many cases of mothers and fathers fighting around this 40% rule in order to follow through on what might be in their best interests financially at the risk of not really looking at what is in the best interests of their children. (Howard Irving, Mediator, Meeting #11)

Another aspect of this problem is that the guidelines continue to ignore the expenses of the non-custodial parent who provides for and cares for the child during access visits. Non-custodial parents, even those who spend less than 40% of the time with their child, can incur significant expenses. Indeed, arguably they should be encouraged to do so as part of their role as responsible parents.

Child support guidelines should recognize the fixed costs [borne by the non-custodial parent]. Whether your children are there today, tomorrow, and at their other parent's home the next day, you have to maintain a bed, you have to maintain their home, you maintain their toys and those

55 Section 9, Federal Child Support Guidelines, SOR/97-175.

This problem was recently recognized by the Ontario Court (General Division) in *Rosati* v. *Della Penta* ((1997) 35 RFL (4th) 102), where Justice Eberhard concluded that "the section 9 [of the Federal Child Support Guidelines] delineation of 40% of time has distracted these litigants from the real questions in custody proceedings and has led the discussion into a backwards determination of custody being arranged to address support issues rather than support ordered to facilitate appropriate custody/access" (p. 104).

types of things. There are certain costs that remain fixed whether you have your children one weekend or truly 50-50. (Marina Forbister, Equitable Child Maintenance and Access Society, Meeting #20, Calgary)

Many witnesses agreed that the 40% figure was too arbitrary, citing cases where fathers spending as much as 38% of the time with children were still required to pay the full amount under the guidelines. Most of these witnesses argued that recognition of non-residential parents' expenses should be based on a range of 20 to 40% of the time, provided there are proven significant expenses. The expenses of these parents when living a significant distance from their children can be particularly burdensome and should not be ignored. For reasons of fairness, the Committee is concerned about the 40% rule and the guidelines' failure to take into account significant parenting expenses. Members are even more disconcerted by the negative impact of the 40% rule on parenting negotiation and decision making. Witnesses asked the Committee to recommend that the Government investigate further how these aspects of the guidelines should be altered.

This Committee, along with the Senate Social Affairs Committee, heard a number of witnesses object strongly to the perceived unfairness of basing child support solely on the income of the payor, without taking the recipient parent's income into account. The pre-guidelines test for the amount of child support to be paid by the non-custodial parent — the apportionment of the costs of raising the child between the parents according to their relative ability to pay — seems to many to be intuitively more reasonable and palatable. Similarly, the guidelines' financial disclosure provisions, which require regular disclosure by the payor to the recipient, apply only to the payor. This apparent inequity rankles non-residential parents, who feel that the concerns of custodial or primary residential parents are being attended to without any government action on non-custodial parents' access enforcement problems. Marina Forbister of the Equitable Child Maintenance and Access Society articulated this point of view:

Child support guidelines should be based on the income of both parents. That has been an area that has been much discussed when the guidelines were implemented. It was suggested that this was one set of guidelines, and it's based solely on the income of the non-custodial parent. That is an area that has been subject to a lot of controversy. It is perceived by Canadians as being unfair. (Meeting #20, Calgary)

Not all provinces have followed the federal example in adapting the guidelines. For example, the tables under Québec's guidelines are based on the income of both parents. In Newfoundland, mutual financial disclosure is required. As David Day, a family law lawyer in St. John's, pointed out, under the civil procedure rules of most, if not all, provinces and territories, financial disclosure from either parent can be sought through lawyers or by application to a court.

Two other related matters came to the attention of the Committee. One is the mandatory, non-discretionary nature of the guidelines. Even if they wish to, parents are not free to agree to opt out of the support tables or other provisions. Judges will sign child support orders or judgements only if they are satisfied that the requirements of the guidelines have been met. This limit on parents' freedom to settle their affairs by agreement was seen by some as an unreasonable restriction on their ability to make post-separation arrangements for their family as they see fit.

The Committee is also concerned about the impact of the guidelines on parties receiving public assistance. The concern, Members were told, is that in some parts of Canada a recipient parent could be deemed to be in receipt of the amount of child support that had been ordered under the guidelines, even if the support order was in default. The result would be that the support amount would automatically be deducted from that parent's public assistance benefits, potentially leaving the family without adequate funds in the event of non-payment of support. Although the administration of public assistance programs is not within

federal legislative jurisdiction, Members of the Committee thought it important that the impact of the guidelines on that type of income be examined carefully.

As consideration of the Federal Child Support Guidelines did not fall strictly within the Committee's mandate, and as the Committee had not actively sought evidence on this topic, most Members of the Committee felt that it would not be appropriate to recommend to the Minister of Justice just how the problems with the guidelines should be corrected. A number of witnesses did not address issues related to the guidelines, or child support more generally, and the Committee expects that many would have if they had been asked to do so. However, given the volume of evidence dealing with concerns related to the guidelines, the Committee felt that our witnesses' objections should be reviewed by the Minister of Justice.

Recommendation

- 18. Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:
 - 18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed by this Committee;
 - 18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;
 - 18.3 The desirability of considering both parents' income, or financial capacity, in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is "shared parenting";
 - 18.4 Recognition of the expenses incurred by support payors while caring for their children;
 - 18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;
 - 18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;
 - $\textbf{18.7} \ \ \textbf{The ability of parties to contract out of the Federal Child Support Guidelines; and}$
 - 18.8 The impact of the Guidelines on the income of parties receiving public assistance.

(vi) The "Friendly Parent Rule"

Section 16(10) of the *Divorce Act* is known as the "friendly parent" or "maximum contact" rule. It sets out the principle that "a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child" and requires the court to take into account the willingness of each parent to

facilitate contact between the child and the other parent. Proponents of shared parenting or joint custody argued that this principle is not applied often enough by the courts, or is even ignored. Lawyer Bruce Haines, who has practised law for 35 years, advised the Committee:

I've also seen the section of the *Divorce Act* that says that when it considers the awarding of custody, the court will take into consideration the parent who facilitates contact. I have yet to see that section used. I read all of the family law reports across this country, and it's almost never mentioned. (Meeting #12, Toronto)

Advocates for women, particularly those working with women who have experienced violence, argued against the friendly parent rule, saying that the presumption in favour of maximum contact could put women and children at risk. Ruth Lea Taylor, a family law lawyer and member of the Vancouver Coordination Committee to End Violence Against Women in Relationships, argued that the provision hangs a threat over women who have been victims of family violence: that they might lose custody if they fail to provide access to a violent spouse (Meeting #19). Elaine Teofilovici, of the YWCA, argued that "in cases where a parent has been the victim of spousal abuse, the victim's willingness to facilitate contact with the abusive spouse should not be considered a factor in determining custody." (Meeting #8)

Because there are conflicting opinions about the friendly parent rule, both with merit in the view of Committee Members, the Committee is recommending that the principle of maximum contact be included in the list of criteria for determining the best interests of the child that the Committee proposes be added to the act (see Recommendation 16). In this way, the principle of maximum contact would be considered by judges and parents and could be weighed against other important criteria related to the best interests of a child.

(vii) Access Enforcement

One of the most contentious, heated, and frequently mentioned issues was what is now called access — its denial, non-exercise and enforcement. This issue attracted hours and hours of testimony, pages and pages of transcripts, and many pointed exchanges during the Committee's meetings. There are a number of aspects to this issue: Do mothers deny fathers access? Do fathers fail to exercise access? Do courts enforce access orders and agreements? Is access necessary, or beneficial, for children? Is a punitive solution appropriate, or is a more service-oriented solution more likely to promote the best interests of children? These questions represent the source of some of the most deep-seated, intractable dissatisfaction with the family law system.

A complication of the access enforcement problem is Canada's constitutional division of powers. Not surprisingly, access enforcement is not one of the enumerated powers under the *Constitution Act*, 1867. Generally, the enforcement of access, like the enforcement of spousal and child support, has been treated as a provincial power, under the "property and civil rights in the province" heading. Any measures aimed at access enforcement proposed or adopted in Canada to date have been advanced at the provincial or territorial level.

As a number of witnesses advised the Committee, under the current regime, access is more likely than custody to cause problems for separated and divorced couples. The Committee heard many stories told with bitterness and anger about denied access, frustrated access and severed father-child relationships. Nevertheless, the Committee recognizes that the majority of access arrangements work reasonably well and proceed without incident. In spite of the wealth of anecdotal evidence the Committee received about the problem of access denial, little empirical evidence exists on the subject. An Alberta study on access following parental separation found that while most non-custodial parents were not denied access either by the custodial parent or a court, over one-third of custodial and non-custodial parents felt that the non-custodial parent was

not visiting the child or children as much as they would have liked.⁵⁷ The same study did report, however, that many more non-custodial parents than custodial parents reported feeling that parental interactions related to access were difficult and strained.

The question of which problem is more widespread — denial of access by custodial parents, or failure of non-custodial parents to exercise access — is one the Committee is unable to answer with precision. It is clear, however, that both have negative consequences if the result is that the child loses contact with one parent. The Committee is concerned about both problems and regrets that, although many solutions were proposed to the problem of access denial, few if any were offered for the problem of failure to exercise access. Committee Members would like to encourage the regular exercise of access, by whatever means possible, wherever it has been found to be in the best interests of a child.

Fathers who testified about denial of access stressed the painful separation between parent and child that results. Particularly with very young children, this can prove disruptive to the relationship, sometimes irretrievably so. Young children whose non-residential parent disappears for an unexplained, lengthy period of time suffer tremendous hurt and feelings of betrayal and abandonment. Clearly this result conflicts sharply with the best interests of that child. Parents pleaded with the Committee to recommend measures by which parents who are entitled to access by virtue of a court order can reliably expect that access to take place.

What is agreed to has to be enforced. A child must be able to continue his relationship with both parents and not have it put on hold for weeks and months until all disputes and accusations are dealt with. The onus has to change so that children are automatically allowed to see both parents. Access is not something that should be argued and fought for. Access should be a child's right. (Rick Morrison, Fathers for Justice, Meeting #13, Toronto)

By contrast, a number of women and advocates for women argued that failure by parents to exercise their access is the more prevalent problem, and one that is less susceptible to correction by enforcement measures. When access is exercised irregularly, or not at all, custodial or residential parents must deal with disrupted schedules, disappointed children, and sometimes increased costs. These witnesses also emphasized that there are occasions when the custodial parent must, in the interests of a child, deny access at specific times, such as when a child is ill or the visit would otherwise not be in that child's interest. They argued that the custodial parent's power to exercise such discretion, within reason, must not be undermined.

For every case that we come across where a parent is claiming that they have been denied the right to see their child, there are ten cases where parents do not exercise the access they have been provided with. These cases aren't litigated; they aren't fought in the courts. In our view, that's because it's accepted as the norm. (Claire McNeil, Dalhousie Legal Aid, Meeting #30, Halifax)

The solutions witnesses offered to deal with the problem of access denial varied widely. Most recommended a hierarchy of responses, recognizing the complicated nature of post-divorce relationships between parents, the complexity of children's lives, and the need to deal sensitively with all the participants in an access problem. For example, Joyce Preston, the British Columbia Child, Youth and Family Advocate, recommended a service-oriented solution.

I always go to a service solution that would, for me, be child-centred, I hope, rather than going to a punitive solution to either one. There are custody and access arrangements that seem to forever remain acrimonious, like "We will never get along, and every time it will be a fight", and I think

⁵⁷ Debra Perry et al., "Access to Children Following Parental Relationship Breakdown in Alberta" (Calgary: Canadian Research Institute for Law and the Family, 1992), p. xiii.

there are ways of developing service centres that can act as intermediaries in regard to those arrangements, that may even be attached to the court system or something like that. Going to a punitive system never serves the children. It sort of punishes the adults and escalates that war and doesn't do anything with respect to the children who it's about. (Meeting #19, Vancouver)

Similarly, the National Family Law Section of the Canadian Bar Association (CBA) emphasized the complexity of these cases and advocated a non-legislative response.

I can tell you that in none of the cases [of access denial by a custodial parent] I've been involved in would a simplistic solution be employable successfully. They were all complicated, and all of the circumstances had to be dealt with on an individual basis. So [we recommend] services to parents [to] assist, [including] counselling, the provision of supervised access in appropriate circumstances, and they can enlarge the budget to provide for child advocates in appropriate circumstances. Changing the law will do little or nothing to address these problems. Providing services, programs, and funding will. (Eugene Raponi, Meeting #23)

The CBA did recognize the need to empower judges to order the police to intervene in appropriate cases to enforce access and that contempt proceedings are available to deal with those limited cases where parents frustrate access and the problem cannot be solved through mediation or education programs. Given the traumatic effect of using the police to enforce access, however, the CBA also recommended that a number of officers in every police force receive specialized training to help them deal effectively with these situations.⁵⁸

Other witnesses alluded to the "parenting coordinator" model used in some U.S. jurisdictions. This individual is available to the parties at relevant times to deal with disputes as they arise.

There must be a facilitator in place when access denial is going on—not an assessor or a mediator, a facilitator. At 7 p.m. on Wednesday when you're supposed to see your kids and can't, you call somebody up and your access is going to happen, because that person is going to find out what the issues are right then and there, not six weeks down the road when you get a new judge who's going to adjourn it for another six weeks and another \$3,000 bill. I don't need that; I need to see my kids at 7 p.m. on Wednesday. (Wayne Allen, Kids Need Both Parents, Meeting #13, Toronto)

Several witnesses cited the model in place in Illinois, under the *Unlawful Visitation Interference Act*, which provides that

Every person who is in violation of visitation provisions of a court order relating to child custody or detains or conceals a child with the intent to deprive another person of his or her rights to visitation shall be guilty of unlawful visitation interference. (Cited by Grant Wilson, Mississauga Children's Rights, Meeting #12, Toronto)

Some defences are available: that the custodial parent committed the act to protect the child from imminent physical harm, provided that the belief in imminent harm was reasonable, or that the act was committed with the mutual consent of the parties or was otherwise authorized by law.

Other options for inclusion in a hierarchy of responses to unreasonable denial of access by a custodial parent include referral to counselling or parenting education, with particular emphasis on parental alienation and its harmful consequences for children, an assessment by a qualified mental health professional, a

⁵⁸ See, for example, the 1997 Ontario case Fergus v. Fergus, 33 RFL (4th) 63 (Ont. CA), where the repeated use of police by the non-custodial parent to enforce access was humiliating and harmful to the children and ultimately destructive of their relationship with the non-custodial parent.

mandatory review of the parenting arrangement, the payment of a fine, imprisonment of the custodial parent, and automatic reversal of custody. The Committee notes that several of these options are controversial, as their potential impact on children may be more harmful than helpful. One practical but partial solution to conflicts over access was put forward by several witnesses. They recommended establishing a national data bank for custody and access orders (or, under the new regime we propose, shared parenting orders), enabling police officers called upon to enforce an order to determine immediately whether that order is the most recent one.

A key observation here is that it would not be desirable for new, stringent enforcement mechanisms to apply to orders made under the *Divorce Act* in the absence of consistent mechanisms in all provinces under provincial family law. In terms of a punitive response, the Committee notes that to some extent an offence-based remedy already exists. Canadian courts can find a custodial parent who denies access in contempt of court. Penalties applied in contempt of court cases since 1980 have ranged from orders for the payment of family counselling costs to the application of make-up access time, the imposition of a fine, and, in extreme cases, incarceration. Also, section 127 of the *Criminal Code* was brought to the attention of the Committee by Linda Casey, of Helping Unite Grandparents and Grandchildren (Meeting #12). That section makes disobeying a court order an indictable offence.

In the Committee's opinion, the optimal solution to the problem of access denial would be one arrived at in a co-ordinated fashion by the federal government and all the provinces/territories working together, so that the solution provides more than a punitive response and is put in place across the country for all kinds of parenting orders. The Committee agreed that the availability of mechanisms for speedy resolution of disputes over parenting time provisions in parenting plans or orders will be key to reducing conflict between parents.

Recommendations

- 19. This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders.
- 20. This Committee recommends that the federal government establish a national computerized registry of shared parenting orders.

(viii) Grandparents' Applications for Parenting Orders

Another issue that was raised often but will require a response at the provincial level is applications by grandparents for parenting orders. Parliamentarians have long been aware that grandparents' groups are dissatisfied with the current provisions of the *Divorce Act*, which allow them to apply to the court for access to or custody of a grandchild, but require that they first apply for leave to do so.⁵⁹ This leave application requirement is considered an unnecessary and costly burden on grandparents.

The testimony of grandparents denied contact with their grandchildren following the divorce, separation or death of their own child was particularly painful for Members, many of whom are grandparents

⁵⁹ Section 16(3), Divorce Act.

themselves and could readily empathize with witnesses. However, amending the *Divorce Act* to remove the leave application requirement would be of assistance only to grandparents whose child is currently involved in a divorce. Other grandparents would have to continue to rely on provincial statutes, most of which already allow them to apply without leave. For example, Annette Bruce, of the Orphaned Grandparents Association, provided the following breakdown of the grandparents she has worked with:

Some of the causes [of grandparents being denied access to grandchildren] have been common-law relationships, 26%; divorce, 40%; intact families, 17%; death of adult children, 10%; and conflict with one or more or both parents, step-parent adoption, etc., approximately 17%. (Meeting #20, Calgary)

Because federal jurisdiction in family law is restricted to matters of marriage and divorce, including corollary relief, the idea of making grandparents automatic (or even almost automatic) parties to divorces has been seen as constitutionally problematic. This was one of the concerns that may have led members of the House of Commons Standing Committee on Justice and Legal Affairs to defeat a private member's bill, Bill C-232, advanced by Reform MP Daphne Jennings in December 1995. Mrs. Jennings (who is no longer an MP) testified before this Committee in Vancouver and endorsed a similar private member's bill recently proposed by Liberal MP Mac Harb. ⁶⁰

The Committee found the testimony of grandparents and their representatives extremely compelling. The Committee also heard moving testimony, however, about the importance of siblings, stepsiblings and other extended family members in the lives of children. Other important people in the life of a child might well be family members or friends, and many Members of the Committee felt there should be no legislative presumption that grandparents have a different standing in parenting applications relative to those other important people.

A solution for recognizing the important role of grandparents, and one that is thought to be less susceptible to constitutional challenge, would be to include mention of the importance of grandchild-grandparent relationships to children's well-being in the proposed list of criteria concerning the bests interests of the child. This would reflect the principle articulated by a number of witnesses that children's established relationships with grandparents should be safeguarded and that the presence of grandparents can enrich a child's life. Such a criterion could be weighed against any potential risk to a child posed by a particular grandparent, or any perceived interference with a parent's, or both parents', decision-making responsibilities with respect to a child. As Patricia Moreau, of the Canadian Grandparents' Rights Association, recommended:

We submit that the $Divorce\ Act$ should provide that this relationship be presumed to be in the best interests of the child, and that it should therefore not be disturbed unless it can be demonstrated to a court that it is not in the best interests of the child. (Meeting #9)

The Committee held several long discussions about the representations made on behalf of grandparents — about which Members were unanimous in their sympathy, but not in their conclusions about the most appropriate remedies to recommend. The Committee decided to recommend that the concerns of grandparents be addressed in two ways. First, the importance of grandparent-grandchild relationships should be included in the list of statutory criteria that will guide those making shared parenting determinations under the "best interests of the child" test (see Recommendation 16). Second, the importance of relationships with grandparents and other extended family members must be considered and provided for in the development of parenting plans (see Recommendation 12).

⁶⁰ Bill C-340.

The Committee suggests that further solutions to the problems raised by grandparents will require action by the provincial and territorial governments. Grandparents advised the Committee that legislative action is being considered in at least three provinces — Ontario, New Brunswick and Alberta — to promote continued relationships between grandparents and grandchildren where this would be in the best interests of the children. Grandparents in Québec can already rely on Article 611 of the *Civil Code:* 61

This section provides for grandparents' rights, and these rights are independent of situations. Elsewhere in Canada, it would appear that the access of grandparents comes under the *Divorce Act*. Divorce is perhaps one of the reasons that separate grandparents from grandchildren, but it is not the only one. I appreciate that, in Québec, regardless of whether or not a divorce has taken place, we have this *Civil Code* section that guarantees grandparents natural access to the grandchildren, except, naturally, in cases of incest or in cases where there are valid reasons which we would not defend. (Albert Goldberg, GRAND Québec, Meeting #15, Montréal)

Members commend to the other provinces the wording of Article 611 of the Civil Code of Québec, which provides that in no case shall a parent, without a grave reason, interfere with personal relations between a child and his or her grandparents.

Recommendation

21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child.

B. Other Federal Contributions

Members of the Committee want to emphasize that promoting better outcomes for children whose parents divorce is not a goal that can be assigned solely to the federal Department of Justice. It is a multi-faceted issue, and solutions will have to be undertaken across the federal government and at other levels of government as well. The recommendations in this report reflect the complexity of the problem as well as the layered responses that will be required.

(i) Federal Leadership

A concern expressed by many witnesses was that achieving positive outcomes for children whose parents divorce depends in large measure on the availability of the necessary resources. Almost all the innovative new initiatives in place across Canada, including parenting education, non-adversarial dispute resolution, therapeutic interventions and new programs in the courts, are currently restricted in scope because of limited funding. This Committee is of the view that one of the contributions of the federal government to helping children of divorce in a measurable way is to provide resources where necessary, so that these beneficial measures can be made available to as many children and their families as possible.

Although not limited to legal aid, the inadequacy of resources for civil legal aid programs across the country was cited by many witnesses as an impediment to better outcomes for a significant number of

^{61 &}quot;In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court."

families. Since the early 1990s, legal aid funding for family matters has decreased in every province of Canada. Witnesses who expressed concern about the current inadequacy of legal aid funding for civil matters cited the financial devastation families have experienced as a result of legal costs and the difficulties and increased expense that unrepresented litigants pose for themselves and others. Related problems include restricted access by individuals to legal advice, which might otherwise help them make their own parenting decisions, the result being poorer outcomes in contested custody or access disputes. Family law litigants are among the least able to obtain good representation that is affordable; for every separating couple, financial issues become more pressing, not less so. For a couple attempting to shift from one household to two, legal help may appear to be an unaffordable luxury. However, the Committee is concerned that without good legal representation, Canadians may not be able to benefit from the protections extended by our current divorce law or any future improvements to it.

Witnesses from a variety of professional backgrounds indicated that accessible and affordable legal advice could indeed represent a cost-saving measure for individuals and for society. Parents who understand the legislation and know their legal rights and obligations are in a better position to make their own lasting parenting arrangements or to negotiate them through counsel. As Professor Bala argued, a good lawyer should not be considered a luxury.

At least in some cases, a lawyer is a necessity. In fact, again at least in some cases, having a lawyer not only provides advice and protects people's economic and social rights, but he or she can actually lower the temperature. A good family lawyer will provide a range of very important advice for people. (Meeting #6)

The more complicated a family law case, the more necessary legal aid resources often become. Legal aid funding can provide quality custody and access assessments, to assist parents or provide guidance to judges. If guidelines or tariffs allowed, it could also fund mediation. Most important, legal representation — funded where necessary by legal aid plans — ensures that parties to litigation are functioning on a level playing field. One of the most inexpensive ways to provide a minimal level of legal aid to individuals is through the presence of duty counsel in courts where family law matters are being heard. As Keith Wilkins, of the Ontario Legal Aid Plan, described it, duty counsel "provides summary advice at court, and often results in successful negotiations and settlements of cases at a very early stage in proceedings". (Meeting #12, Toronto) This model is currently in place in the provincial family courts of Ontario, as well as some other jurisdictions. The recent Ontario Civil Justice Review recommended the expansion of the program to the General Division Court as well.⁶²

Submissions about the harmful effects of inadequate legal aid funding and the lack of legal aid for civil cases were most stark in Prince Edward Island. Virtually all witnesses mentioned the absence of legal aid; assistance is available only in emergency situations where there is a present threat of violence. Ann Sherman, of PEI's Community Legal Information Association, indicated that a limited program is funded by the Law Foundation of PEI, which offers up to \$500 (or in exceptional cases, \$1,000) per client on a first-come, first-served basis. There are also staff lawyers at Health and Social Services who can assist clients receiving public assistance in seeking child support. Daphne Dumont, a PEI family law lawyer, made a dramatic argument in favour of no legislative change until the people affected — family law litigants — have access to legal assistance.

Children suffer when families can't get legal aid. New legal rights are useless without a means of access to justice. ... It's better to leave things as they are than to dangle inaccessible guarantees just beyond the fingertips of the most deprived citizens. Indeed, since all new laws are open to

Ontario Civil Justice Review, Supplemental and Final Report (Toronto: November 1996), p. 139.

interpretation, if you change the *Divorce Act* and establish new access standards, you will be invalidating our solid old precedents and giving parents a whole new set of undefined guidelines to argue about. Before you do this radical act, make sure parents of children in poorer families will have resources to add their voices to the arguments that will certainly result if you change the *Divorce Act*. (Meeting #31, Charlottetown)

The Committee is of the view that the inadequacy of civil legal aid is a problem that requires further study.

The various initiatives identified by this Committee as requiring financial support from the federal government — with contributions from provincial and territorial governments — range from the augmentation of funding for civil legal aid, through the expansion of unified family courts across Canada, to the appointment of a new Children's Commissioner. The creation of this new Commissioner, who would report to Parliament, would ensure that children's interests under the *Divorce Act* and in other areas of federal jurisdiction are promoted. Legal representation for children, when such counsel is appointed by a judge, is also seen by this Committee as a crucial service that should not be denied a child because of inadequate funding. The other programs the Committee would like to see assured of adequate funding include parenting education programs, supervised access or parenting programs, and family law-related judicial professional development.

Many witnesses also urged expansion of training programs for judges to include issues surrounding post-separation parenting arrangements and to emphasize the particular aspects of concern to witnesses. For example, grandparents' groups wanted judges to receive more training on the importance to children of grandparents and extended family, fathers' groups argued that judges needed more training about the significance of children's relationships with their fathers, and women's groups tended to argue that judges should receive more training about violence against women and its impact on children. The Committee agrees that these are all important areas, and that better-informed judges will produce better, more consistent results for children.

Because of the constitutional division of powers and the importance of an independent judiciary, there are restrictions on the degree to which judicial training in any area can be made mandatory or even recommended for all judges dealing with family law matters. However, judicial training programs in this and other areas do exist. One is the judges' component of the annual National Family Law Program, hosted by the Federation of Law Societies. For judges participating in these programs, some of the matters brought to light during this study would likely be of great interest. To the extent that the federal government provides training for family law judges, in that it funds programs for federally appointed judges, the Committee urges that the preoccupations of witnesses before this Committee and issues related to the impact of divorce on children increasingly form part of regular judicial training. The provinces are urged to consider this suggestion as well.

Recommendation

- 22. This Committee recommends that the federal government provide leadership by ensuring that adequate resources are secured for the following initiatives identified by this Committee as critical to the effort to develop a more child-centred approach to family law policies and practices:
 - 22.1 Expansion of unified family courts across Canada, including the dedication of ample resources to interventions and programs aimed at ensuring compliance with parenting orders, such as early intervention programs, parenting education, make-up time policies, family and child counselling, and mediation;

- 22.2 Civil legal aid to ensure that parties to contested parenting applications are not prejudiced by the lack or inadequacy of legal representation;
- 22.3 A Children's Commissioner, an officer of Parliament reporting to Parliament, who would superintend and promote the welfare and best interests of children under the *Divorce Act* and in other areas of federal responsibility;
- 22.4 The provision of legal representation for children when appointed by a judge;
- 22.5 Parenting education programs;
- 22.6 Supervised access programs; and
- 22.7 Enhanced opportunities for professional development for judges, focused on the concept of shared parenting formulated by this Committee, the impact of divorce on children, and the importance of maintaining relationships between children and their parents and extended family members.

(ii) Unified Family Courts

There was agreement about the concept of unified family courts — courts that exercise jurisdiction in relation to family-related laws at both the federal and the provincial level. Most witnesses recognized the value of specialist courts with jurisdiction to hear all cases dealing with family law, particularly where the adjudicative function of the court is combined with related therapeutic and mediation services. Lawyers who practise in jurisdictions with unified family courts described being able to refer clients initially to counsellors affiliated with the court, who were often able to effect amicable settlements, particularly of problems such as access disputes or variation claims.

Unified family courts are in place in several jurisdictions across Canada. The first were established in St. John's, Newfoundland, and Hamilton, Ontario, in 1977. Under section 96 of the *Constitution Act, 1867*, provinces cannot give jurisdiction to a provincially appointed judge that is analogous to that exercised by a federally appointed one. To hear matters under federal legislation, such as applications for divorce, or to grant certain types of relief restricted to the purview of superior court judges (such as injunctive relief), unified family courts must be presided over by federally appointed judges. Such courts can therefore be established only through federal-provincial co-operation.

Unified family courts are operating across New Brunswick and Saskatchewan⁶⁴ at present, as well as in Winnipeg, five cities in Ontario (with a further expansion announced and now being negotiated by federal and provincial governments), and St. John's, Newfoundland. Not all the courts are unified in the same way, however. For example, the St. John's Unified Family Court does not hear child protection matters, and not all the courts have the same type of non-adjudicative services attached to them. In other provinces, such as Québec, and other cities in Ontario, there are specialized family law judges or divisions within courts. The federal government announced the availability of funding for 27 new unified family court judges in March 1998.

The Committee recognizes the benefits to Canadians, and particularly their children, of having parenting disputes resolved by expert, sensitive judicial officers, particularly if family law matters governed

An exception to this rule was lawyer Tony Merchant, who testified in Regina that the "sequestered" unified courts, such as those in Hamilton and St. John's, have been less successful than specialized judges within general civil courts, following the model in Alberta, British Columbia and many Ontario judicial districts.

⁶⁴ In both provinces, family law matters are heard in the Family Law Division of the provincial superior court.

by different laws, such as custody/access and child protection, can be heard together or dealt with in the same court. More important, the Committee finds that the combination of litigation services with expert counselling services is likely to promote positive outcomes for children whose parents divorce. Therefore, the model of the unified family court is to be encouraged as far as possible across Canada.

Some witnesses went beyond the current model of a multi-purpose unified family court to propose other types of service centres to help families in the process of reorganizing after a separation. For example, Sharon O'Brien, Chair of the PEI Advisory Council on the Status of Women, argued for establishment of a "family dispute resolution agency" to "serve as a point of entry into the legal system for case assessment and referrals and to act as a clearinghouse" for information on related programs and services for parents and children. (Meeting #31, Charlottetown) The Committee's view is that this type of service centre would be beneficial, whether located in unified family courts or outside them.

The Committee is generally agreed that the program of expansion of unified family courts across Canada should be accelerated. The majority of Committee Members agree with the assertion in the 1977 report of the Law Reform Commission of Canada, *Report on Family Law*, that unified family courts represent the best mechanism for reducing costs and confusion caused by Canada's fragmented constitutional jurisdiction in family law matters. Like the Law Reform Commission, the Committee is particularly aware of the advantage of non-litigation services being available to parents and children through the offices of a unified family court. Therefore, the Committee is recommending that unified family courts in all cases have a support arm, including family and child counselling, public legal education, mediation and assessment services, and an office responsible for hearing the views of children who are experiencing difficulties stemming from parental separation or divorce. Such courts should also offer case management services designed to monitor the progress of high-conflict cases through the litigation process and to monitor implementation and enforcement of shared parenting orders.

An important procedural innovation, and one that all provinces have adopted to varying degrees, is the use of case management or early judicial intervention. The range of such programs was described by Heather McKay, Chair of the National Family Law Section of the CBA:

Virtually every jurisdiction in Canada has adopted some method of dispute resolution that they try to put up front before [parties] get involved in the court litigation system. Some of these are mediation, pre-trial conferences, four-way negotiations among counsels and lawyers, counselling with psychologists, and bilateral custody assessments. (Meeting #23)

Along with mediation, these mechanisms make up a spectrum of alternative dispute resolution forums that have generally been very effective in facilitating speedy, inexpensive resolutions for all types of family law disputes.

Judge Thomas Gove of the Provincial Court of British Columbia described his experience in the Judge Mediated Case Conference system, introduced initially for child protection matters and now extended to custody and access disputes (Meeting #38). Judges trained in mediation help the parties come to agreement through a mediation process. It is thought that a judge may provide more encouragement to settle than a mediator who is not a judge might do. Case conferences have the advantage of allowing additional participants to be included, such as children over 12, or younger if the judge so directs, grandparents or extended family members, representatives of Aboriginal organizations, advocates, lawyers and, where appropriate, social workers. Very few participating families have failed to reach agreement through this program, thereby reducing the number of trials taking place. This has beneficial consequences not only for the families involved, but also for taxpayers.

Systems similar to British Columbia's have been put in place in other provinces as well. Ontario has developed a system in which senior family law practitioners act as volunteer Dispute Resolution Officers, meeting with parties who have applied to vary their divorce judgements to see whether they can help them reach agreement. Case conferences with judges are also required in Ontario before parties appear before a judge on custody and access applications. Pre-trial conferences held before judges are mandatory at both provincial and general division courts for all family law matters. Pre-trials, where judges encourage the parties to settle by giving them an indication of the likely outcome at trial, are taking place in most Canadian jurisdictions.

An expanded case management system was proposed in Ontario's recent *Civil Justice Review*. ⁶⁵ That 1996 report recommended establishing three types of conferences in civil matters: case conferences, settlement conferences and trial management conferences. The recommendation was that the case management rules be in place across Ontario by the year 2000.

The Committee is encouraged by the creativity and resourcefulness displayed by various jurisdictions in developing models for early judicial intervention. One additional feature, modelled on examples from several U.S. jurisdictions, would be to include a new type of judicial officer in a case management system — referred to as a special master or parenting co-ordinator — who would be assigned to high-conflict cases and follow them throughout the legistative process. These officers are often assigned the task of resolving disputes over parenting times or visitation.

To the extent that shared parenting applications under the *Divorce Act* are being heard in unified family courts, the Committee believes it is important that the rules of such courts provide that child-related family law matters have priority over matters related to financial issues such as division of property, or cases where children's interests are not affected.

Delays in family law litigation were cited by many witnesses as exacerbating factors in situations that are already contentious. Of particular concern to the Committee is the impact on parent-child relationships of long delays during which meaningful contact does not take place. There was recognition, however, that acrimonious parenting disputes can be hurried only to a limited extent. In many cases such matters require expert psychological or social work assessments, and the quality of such reports depends on the assessors having sufficient time with family members to observe and reach conclusions.

In the state of Michigan, 56 days is the outside time limit for hearings on custody and access matters to be commenced by the courts. Judge John Kirkendall advised that this time limit is treated as a guideline, however, more than a mandatory requirement.

One of the things you have learned about from people who are experts in child development is that one of the worst things a court or any of us can do is to disrupt a child's present environment unnecessarily. So when somebody comes to court and asks for a change of any sort, that is a yellow flag for us. We don't want to destroy a child's environment without knowing a lot about the situation. So we refer these cases to the friend of the court, who may have to get somebody else involved, and then we may have to wait for a report. The Supreme Court and Court of Appeals have indicated to us in Michigan that if we don't handle one of these cases within the prescribed time limit, that is not a violation that's going to interfere with the enforceability of our orders. It's merely a suggestion of good practice, of trying to get these cases settled in a priority way. I think it's merely a way of saying that child custody cases are extremely important cases and judges should give those priority, and we do that. (Meeting #26)

⁶⁵ Ontario Civil Justice Review, pp. viii-ix.

Access matters, most witnesses agreed, can and should be dealt with as expeditiously as possible, to minimize harm to the relationship between the child and the non-residential parent. For example, the Fondation du Barreau du Québec recommended in 1997 "fast-tracking cases in which access rights are violated or there are problems of execution". (Roger Garneau, Meeting #4) The Fondation also recommended that in cases where access difficulties are anticipated, the presiding judge should remain seized of the file, either automatically or at the request of the parties, for several months, after which he or she would review the parties' success in operating under the access regime. Other witnesses recommended that child-related matters be separated from the other contentious matters between separating parents, in order to stabilize matters more quickly for the children's benefit.

Also, the rules should discourage the use of *ex parte* proceedings (proceedings heard in the absence of one parent) in all but the clearest cases of emergency. This Committee heard from many witnesses who described the damage done to families where an *ex parte* determination was made and where the subsequent opportunity of the absent parent to be heard was insufficient to overcome the prejudice that parent suffered as a result of the initial decision. Given the nature of family law proceedings, where most positions are extremely subjective, it is particularly critical that judges hear both sides before making important decisions.

In addition or as an alternative to providing non-litigation services through unified family courts, the Committee also heard from witnesses that parenting decisions, or at least some aspects of the process, would be better dealt with in an administrative tribunal, rather than the courts. One such recommendation was made by lawyer Michael Cochrane:

It's my belief now, after having been exposed to the system as it is, that we should have a family arrive at something like a family law tribunal, something that will take a multi-disciplinary approach to helping the family sort out the issues of their finances, the children, and whatever other issues they're up against, perhaps the role of grandparents. That multi-disciplinary panel should have on it a legal voice, an accounting or financial planning voice, and someone who's skilled in social work or family support work. Whatever the family needs, that expertise should be sitting in front of them. The family would be far better served by that kind of support—and I should add public education to the list as well—than by high-powered and highly paid lawyers and judges... (Michael Cochrane, Lawyer/Author, Meeting #13, Toronto)

The Committee considers that the concept of an administrative tribunal to which certain decision-making functions could be assigned is worthy of further study. Some of the responsibilities that the Committee envisions being delegated to such an agency include intervening in disputes between parents over parenting times; helping children affected by such disputes; providing an information and referral service to parents or children; enforcing the support or parenting time provisions or parenting orders; and helping parents adjust parenting plans over time. These non-adjudicative functions might be provided to parents and children in a more staightforward, less costly manner if they were handled outside the courts, but clearly the judicial role of the courts would be maintained wherever necessary. Even where such duties were assigned to a separate administrative agency, the Committee anticipates that wherever possible, such offices would be housed with, or affiliated with, unified family courts.

Recommendations

23. This Committee recommends that the federal government continue to work with the provinces and territories to accelerate the establishment of unified family courts, or courts of a similar nature, in all judicial districts across Canada.

- 24. This Committee recommends that unified family courts, in addition to their adjudicative function, include a broad range of non-litigation support services, which might include:
 - 24.1 family and child counselling,
 - 24.2 public legal education,
 - 24.3 parenting assessment and mediation services,
 - 24.4 an office responsible for hearing and supporting children who are experiencing difficulties stemming from parental separation or divorce, and
 - 24.5 case management services, including monitoring the implementation and enforcement of shared parenting orders.
- 25. This Committee recommends that, as much as possible, provincial and territorial governments, law societies and court administrators work toward establishing a priority for shared parenting applications, above other family law matters in dispute.
- 26. This Committee recommends that in matters relating to parenting under the *Divorce Act*, the importance of the presence of both parties at any proceeding be recognized and emphasized, and that reliance on *ex parte* proceedings be restricted as much as possible.

B. Provincial Governments' Constitutional Responsibilities

1. Access Enforcement

The Committee has recommended a consistent, co-ordinated approach across Canada, designed to ensure the enforcement of access pursuant to orders under the *Divorce Act* as well as under provincial and territorial family law, as the most effective response to the concerns expressed by witnesses (see Recommendation 19). For this to occur, all governments will have to work together. In this section the Committee reviews actions that have been or could be taken by provinces and territories to respond to the problem of access denial.

Courts have the power to find an access-denying custodial parent in contempt of court. In addition, a number of provinces have already enacted legislation to deal specifically with the enforcement of access orders. For example, Alberta's *Provincial Court Act* provides for a fine of up to \$1,000 or imprisonment for the breach of a custody or access order. ⁶⁶ The British Columbia *Family Relations Act* makes it an offence to interfere with an access order without lawful excuse; ⁶⁷ it is an offence that can be proceeded with in criminal court.

In 1989 Ontario passed, but did not proclaim, section 34a of the *Children's Law Reform Act*, which would have created a remedy for wrongful denial of access by permitting the court to award compensatory access, require supervision of the custody or access, order the reimbursement of reasonable expenses, or appoint a mediator to deal with the claim for access. The access enforcement powers specifically do not apply

⁶⁶ Section 3(8).

⁶⁷ Section 128.

to orders made under the *Divorce Act*. The same provisions are in place as section 41 of the Newfoundland *Children's Law Act*, and section 30 of the new Northwest Territories *Children's Law Act* mirrors them as well.

Saskatchewan's Children's Law Act provides that the court may, as a remedy for wrongful access denial, order compensatory access, require supervision of the access, require the custodial parent to give security, appoint a mediator, and make or vary the custody/access order (section 26). A parent who fails to exercise access, or fails to return the child as required, may be ordered by the court, if it is in the best interests of the child, to give security to the custodial parent or provide an address or telephone number. Alternatively, the court may order supervision of the access, the appointment of a mediator, or a variation of the custody/access order. Denial of access, failure to exercise access, or failure to return the child as ordered is not wrongful if it is justified by a legitimate excuse and notice was given. In addition, the Saskatchewan court has contempt powers delineated in the statute.⁶⁸

A number of witnesses, including a large number of support-paying non-residential parents, objected to the fact that Canadian governments had created a state-financed support enforcement system, present in every province, in which government resources are spent on collecting child support. These witnesses felt that equal government attention and resources should be devoted to access enforcement and that there should be a no-fee enforcement agency at their disposal to deal with access disputes. Most provincial governments have resisted this type of demand, possibly because there is a clearer link between support payments and provincial budgets — in that support recipients receiving public assistance have their benefits reduced in proportion to the support collected — and because the incidence of access denial is perceived to be lower than the incidence of support default. A Manitoba attorney general study cited by the Canadian Bar Association compared demand for access and for support enforcement services; 85% of requests for assistance related to support, and only 15% were access problems.⁶⁹

Starting in 1989, Manitoba operated a pilot project, funded jointly by the federal and Manitoba governments, called the Access Assistance Program. Joint funding lasted for three years, then the project was extended for a further year funded solely by Manitoba. Its purpose was to try to help families resolve their access disputes, and it included access to counsellors as well as a legal component.

A number of witnesses promoted the conciliatory, therapeutic model for intervention in situations where access is frustrated, denied or not exercised. Punitive solutions, such as incarcerating or fining the custodial parent, were seen as contrary to the best interests of the children. As Judge Herbert Allard, now retired from the Provincial Court of Alberta, argued:

That is the same kind of difficulty as putting a man in jail for non-support. It's a futile thing. You're not going to get any money out of him when he's in jail. So that's not a new dilemma about using punitive sanctions that are jail-like for what might be viewed as civil contempt, and there never is an easy course to this. We have convicted in Alberta, under the *Summary Convictions Act*, mothers and fathers who have been in contempt of court orders. But it doesn't change anything much. (Meeting #20, Calgary)

More promising proposals included parenting education programs, specific counselling targeting the couple's particular access problem, mediation, make-up time, and potential variation of parenting orders. It is this Committee's view that, where judges enforcing access or parenting time provisions are directed to consider a range of dispositions, outcomes are likely to be more beneficial for children than if the only options are to fine or incarcerate a parent.

These provisions are drawn largely from the *Uniform Custody and Access Jurisdiction and Enforcement Act*, prepared by the Federal/Provincial/Territorial Family Law Committee and the Uniform Law Conference of Canada in 1988.

Canadian Bar Association brief, p. 12.

The enforceability of access was discussed recently by Professor James McLeod in an annotation of the case of B.(L.) v. D.(R.), in which a mother was committed to jail for 60 days after being found in contempt of court. To In this case, there was a finding that the mother, who was the custodial parent, had persistently and wilfully denied access on at least 40 occasions. There was no evidence that the mother had a valid reason for doing so. Indeed, the evidence of staff at a supervised access program was that the child was very comfortable in the presence of her father, possibly more comfortable than she seemed with her mother. As Professor McLeod observed, incarcerating the mother was unlikely to promote access, but the judge was compelled to do so in order to send the message that "there are costs associated with ignoring or violating a court order". The case of the professor is a supervised access associated with ignoring or violating a court order.

Witnesses representing the Barreau du Québec offered an interesting proposal, which would require modification of the rules by which matters proceed in court, but might not require legislative amendment. Reporting on a July 1997 study conducted by the Fondation du Barreau du Québec, Roger Garneau indicated that a more streamlined, less procedurally difficult response to access denial than contempt proceedings would benefit parties and their children.

The Fondation recommends that, instead of resorting to contempt of court, a pointless and quarrelsome expedient, and one that is often dangerous when used in family cases—it is being suggested that it should be prohibited—litigants should instead merely file an application with the Court on appeal saying, "A judgement was rendered on such and such a date and my client was granted access to his or her children, and there's one party, no doubt the spouse in this case, who is obstructing access. We ask you, Your Honour, to intervene quickly to correct this, not in a month, not in three months or in a year, but within a few days." This is one possible measure that would require a certain change in the legal organization of the courts, but that would not call for an amendment of the Act. This requires good will and a desire for efficiency on the part of judges and lawyers. (Meeting #4)

In a recently released report, three members of the Alberta legislative assembly concluded that access issues could not be resolved by a focus on enforcement alone. Among their findings were that children should have a right to the continued involvement of both parents, and that parents should be required to develop a plan to guide parenting arrangements for the family. Government's role should be to "support restructuring families through counselling, parenting support groups, and mediation, all of which give people a chance to find their own solutions tailored to their needs as opposed to having one imposed upon them." The Committee also recommended codifying the sanctions available to a court for breach of a custody or access order, as has been done in a number of provinces. The potential sanctions listed by the Committee include

Orders for supervised access, orders for police to locate and take a child, support payments to trustees on terms, posting of bonds with or without sureties, fines and imprisonment, variation of access or custody orders, orders for compensatory access, appointment of mediators, attendance at parenting courses, and reimbursement of costs.⁷³

The Alberta committee recommended that any sanctions included in a codification should also apply to the failure to exercise ordered access, not merely to the denial of access by a custodial parent.

2. Doorstep Problems

Another area of potential provincial action to assist in access enforcement relates to the concerns of Canadian police forces, as related to the Committee by Vince Westwick, who appeared on behalf of Ottawa

⁷⁰ 35 RFL (4th) 241(Ont. Ct. (Prov. Div.))

¹¹ Ibid., p. 242

MLA Review of the Maintenance Enforcement Program and Child Access, Alberta Justice, June 1998, letter from Marlene Graham, MLA, to Minister of Justice Jon Havelock, p. 2.

⁷³ Ibid., p. 44.

Police Chief Brian Ford, for the Canadian Association of Chiefs of Police. These concerns include the following:

From a police standpoint, [an access dispute the officer is called upon to resolve on the doorstep] becomes an extremely volatile situation that cannot really be resolved in any positive sort of way. It is difficult, if not impossible, for the police officer to resolve the dispute at the doorstep. If lawyers, courts and mediators have been unsuccessful to date, how can the police officer reasonably be expected to be successful in doing so in those kinds of circumstances? Undoubtedly the officer will be criticized by one or other of the parties for the action that is taken. We would ask that [court orders] be clarified, written in non-legal language, the parties be named and clearly identified, and there be concise, clear, unequivocal access schedules, including what might look like an amortization schedule, that would spill out the dates of access, particularly in those high-risk cases.

We would suggest there be some provisions, whether covered under provincial legislation or provincial policy, to deal with what we've referred to as the doorstep problems. Maybe there ought to be a place where the history of these kinds of cases is on file and where the professionals and police can get access to them, particularly in off-hours. (Meeting #24)

The latter concern would be addressed by the Committee's recommendation to establish a national registry of parenting orders (see Recommendation 20). The former would be addressed by making parenting orders more comprehensible to the police officers called upon to enforce them.

Recommendation

27. This Committee recommends that court orders respecting shared parenting be more detailed, readable and intelligible to police officers called upon to enforce them.

3. Public Awareness about Parenting and Relationships

According to a number of witnesses, most separating parents are unprepared for the process of separation or divorce and its negative effects on their children. Many witnesses felt that, given continuing high divorce rates, future parents should receive some training in how to manage conflict during marriage and after separation if it occurs. Witnesses suggested that divorce, including parenting arrangements form part of high schools' family life curricula.

I recommend that we set up these support systems long before families get into conflict. In other words, I would specifically recommend that before a child develops a relationship with the parent at birth, family life education be supported; that the importance of attachment, nurturing and bonding be identified and supported. I feel the public health system could be used to begin this process. It could be further supported through the educational curriculum with family life education. (Kathy Thunderchild, Social Worker, Meeting #20, Calgary)

Other witnesses recommended public education campaigns about the dangers of ignoring children's needs in divorce, as well as expanded marriage preparation programs and parenting classes for new parents. It is hoped that the work of this Committee will contribute to promoting public awareness about this critical area of Canadian life.

The Committee is of the view that, in addition to promoting public awareness about the impact of separation and divorce on children, it is as important to support couples who wish to avoid separation and

divorce. The Committee is aware that a number of church and community groups across Canada already offer programs designed to assist such couples and agree that a special fund should be created to which those voluntary groups could apply for supporting grants. With relatively small grants, community groups would be able to extend the availability of such programs and contribute to couples' efforts to stabilize and strengthen their marital relationships, something the Committee sees as being clearly in the interests of their children.

Recommendations

- 28. This Committee recommends that provincial and territorial governments explore a variety of vehicles for increasing public awareness about the impact of divorce on children and, in particular, the aspects of parental conduct upon marriage breakdown that are most harmful to children, and implement such education programs as fully as possible. To the extent practicable, the Committee recommends that the federal government contribute to such efforts within its own jurisdiction, including the provision of funding.
- 29. This Committee recommends that the federal government extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship.

C. Both Levels of Government

1. Do Not Link Support and Access

In law and policy, the payment of child support and access to one's children on separation and divorce are completely independent. In the minds of many, however, the two are linked in practice. Although the Committee was urged by some witnesses to link them, by reducing or terminating child support in cases where one parent interfered with the other's parenting time, most witnesses insisted that the two remain separate. The child's need and right to the financial support of both parents should not be affected by disagreements between the parents or the conduct of either parent with respect to parenting time.

2. Legal Representation for Children

To expand current programs that make legal counsel or non-lawyer advocates available to children would likely require the involvement and investment of both levels of government. The Committee has recommended that the federal government contribute to this effort (see Recommendation 22). The Committee recognizes the critical importance of providing some form of representation to children, particularly in high-conflict cases, and that the nature of representation should vary with the child's circumstances. Indeed, this is a child's right under the United Nations *Convention on the Rights of the Child.* A number of witnesses emphasized this need, and some, including Calgary lawyer Dale Hensley, concluded that its logical extension is automatic standing for children to participate in actions concerning their future:

In any decisions regarding children in the *Divorce Act*, children must have standing. That needs to be an absolute right. It can't be conditional on being verbally articulate or on age, and that's consistent with the convention. Children should be entitled to representation. If it's a legal

forum, it must be legal representation, and the court must have authority to direct payment of counsel or the representative for the child. There would be many issues inherent in that recommendation, we know, but that's fundamental. However, the ideal would be for advocates to be appointed well before any contentious or legal process was begun by either parent, and that advocate obviously would not necessarily have to be a lawyer. (Meeting #20, Calgary)

Witnesses did not specify an age after which all children would be capable of instructing counsel. However, most agreed that all children 12 or over could instruct counsel, and that often younger children, depending on their maturity, would be able to as well. Jeffery Wilson indicated that lawyers have a responsibility to determine whether any client, adult or child, is competent to give instructions and that lawyers certainly do so. His general observation with respect tochild clients was that "the younger the age, the harder it is to meet [the test of competency]." (Meeting #25)

Some provinces already have well-established programs to provide legal counsel for children in high-conflict custody and access disputes. Ontario's Office of the Children's Lawyer participates on behalf of the children in some 1,600 custody and access cases annually, although this falls short of the total number of files referred by the courts. (The remainder have to be turned down because of resource limitations). The office sees its duty as representing the wishes and interests of the child to the judge. As Wilson McTavish, the current Children's Lawyer, described it:

We do not represent the child's best interest, nor do children instruct us. We obtain our authority to represent the child by court order, under sections 89 and 112 of the *Courts of Justice Act* of Ontario. The child does not hire us, nor do we require the parents or anyone to pay for our professional services. It is a public duty fully funded by the Attorney General of Ontario. Our relationship to the child is one of solicitor and client. We have the responsibility to make sure that evidence about the child's wishes, consistent or not, is known to the court, and that we place those wishes into the context of the overall evidence. (Meeting #12, Toronto)

In other jurisdictions — including all the western provinces — child advocates, who are not always lawyers, represent children in child protection matters. These offices do not represent children in custody and access matters, but representatives of the Canadian Council of Provincial Child Advocates, as well as officials from several provincial member offices, appeared at the Committee's hearings because of concern about the impact of such matters on children. Indeed, although custody and access disputes between parents fall outside the mandates of these offices, their representatives testified to significant demand for advocacy services from children and parents.

Child advocacy is not new in Canada. There have been children's advocate offices around the country for about 20 years. In Quebec and Ontario we've existed since the late seventies. Alberta began its program in the late eighties, and Manitoba, Saskatchewan and British Columbia have had child advocates since 1992 and 1995. The Maritime Provinces and Northwest Territories are beginning negotiations with their respective governments at this time, so we're looking forward to having child advocacy in every territory and province in Canada. None of the provincial children's advocates have a mandate to advocate on behalf of young people before the court. However, due to the volume and the compelling nature of these calls related to custody and access disputes, advocates nationally have agreed together to respond and intervene [in this Committee's hearings]. (Judy Finlay, Ontario Office of Child and Family Service Advocacy, Meeting #12, Toronto)

3. Relocation Cases

One contentious matter between separating or divorced parents arises when one parent, usually the custodial or residential parent, seeks to relocate to another community. This has especially dramatic

consequences if the distance involved is large, but even a relatively short move in geographic terms can have profound implications for the exercise of access by the non-residential parent. In its 1996 decision in *Gordon v. Goertz*, the Supreme Court of Canada set out a series of principles to be applied to such cases. ⁷⁴ There is to be no presumption in favour of permitting moves proposed by custodial parents, but courts must make decisions on the basis of all relevant factors to determine what is in the best interests of the child.

Law professor Rollie Thompson told the Committee about his research on mobility and relocation cases since *Gordon v. Goertz*. In 65% of the 85 reported decisions, the court has agreed to the move proposed by the custodial parent. Courts were more likely to approve a move involving a child age 6 to 11 than moves involving either very young children or children age 12 and over. Professor Thompson argued that the difficulty with the decision, and its reliance on the best interests test, is that it gives very little guidance to parents and lawyers. Decision making is more difficult for parents if they cannot anticipate what a court would decide. Professor Thompson suggests that the custodial or residential parent proposing to move should have to show that the reason for the move is something other than a desire to frustrate access and should also have to propose a revised access schedule. Then the non-residential parent would have to show why the move should not take place. Cases involving substantially shared parenting, as well as cases where the parties have already negotiated restrictions on relocation in separation agreements or consent orders, should be treated differently.

The Committee heard from several witnesses who argued that custodial parents should have a presumptive right to move with a child. Certainly from the perspective of a custodial parent who provides virtually all the care for a child, with little or no involvement of the non-custodial parent, it seems unfair that the non-custodial parent should have any power to interfere with or delay a move. However, this situation would certainly be taken into account by a court.

Other witnesses, including the National Family Law Section of the CBA, offered a compelling argument for a statutory notice period, such that a custodial parent proposing to move would have to give the other parent notice of at least 90 days before the proposed move, to allow time for altering access schedules, negotiation, or litigation if necessary. The Committee agrees that relocation should occur only if agreed to by the parents, or with the court's approval, and that a notice requirement is desirable.

Recommendation

30. This Committee recommends that the *Divorce Act* be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time.

Having their parents live in different cities is an onerous imposition on most children. It seems the most drastic extension of parental separation imaginable, yet in many cases, relocation is essential for economic and other reasons. The freedom to move, particularly within Canada, is a constitutionally protected right and one that policy makers hesitate to restrict. Nonetheless, the impact on children must be recognized. To ensure that a move by the custodial parent does not result in the disappearance of the other parent from the child's life, several witnesses stressed the need to adjust financial arrangements to make regular visits and other contact possible. For example, Lane MacIntosh suggested a new form of tax relief:

⁷⁴ [1996] 2 S.C.R. 27.

The one pragmatic, doable idea I would like to leave with the committee—and I challenge the committee to move forward on it—is for those parents who are separated from their children to be allowed to write off some of the expenses they incur to visit their children and to have their children visit them. Why on God's earth isn't this a tax deductible write-off? Surely it's perfectly natural that it should be. I challenge the committee to look at that suggestion because it would encourage more people to visit their children. (Meeting #32, Fredericton)

Many Committee members thought this suggestion merited consideration.

At the very least, it is clear to Members that in most cases involving a long-distance move by the custodial parent, there should be a re-examination of child or spousal support. The Committee identified this as one of the matters that must be examined by the Minister of Justice in her review of the Federal Child Support Guidelines and also urges the Federal/Provincial/Territorial Family Law Committee to consider how to require this re-examination in relocation cases (see Recommendation 18).

One further circumstance that came to the Committee's attention is that children whose custodial parent lives outside Canada, but who return to Canada periodically to visit the other parent, can seldom meet residency requirements that would make them eligible for health insurance coverage while they are in Canada. The Committee suggests that this problem also be studied by the provinces, with a view to offering some form of short-term coverage, at least, for such children.

4. The Professions

The role of professionals in family law proceedings was discussed by many witnesses and criticized by more than a few. Witnesses singled out lawyers, social workers, psychologists and mediators as having been responsible for, or at least having contributed to, the unfortunate outcome of the witness's family law dispute. To some extent, of course, dissatisfied parties are inevitable. However, such complaints also gave rise to proposals for action that could be very positive for parents and children. For example, social workers and psychologists, in particular those acting as assessors in custody and access matters, and family mediators as well, are not subject to legislated accreditation standards in most provinces, nor is there a clear mechanism for holding them accountable. This is clearly an area that calls for action in some jurisdictions across Canada.

Witnesses also had complaints about lawyers, identifying them and their mental health counterparts as making up the "divorce industry", a term they used pejoratively. This "industry" is described as existing for the sake of making its participants wealthy, which they do, it is argued, by promoting acrimony between divorcing couples and encouraging and extending litigation. On the basis of meetings with a large and probably representative number of professionals from both the legal and the mental health field, the Committee finds that these professions are generally made up of well-intentioned, hard working and highly skilled individuals. A July 1997 report by the Fondation du Barreau du Québec also revealed, somewhat contrary to expectations, a high level of satisfaction with both judges and lawyers in divorce proceedings.

Allow me to draw your attention to a few of the conclusions and recommendations by the Fondation's special committee. First, to the general surprise of the judges and lawyers on the committee, it turned out that the vast majority of divorced persons interviewed were very satisfied with judges and with their lawyers during their divorce. (Roger Garneau, Barreau du Ouébec, Meeting #4)

Clearly, lawyers are not always the problem in family law disputes, however onerous legal fees might seem to individual litigants and however disappointing the outcome. Lawyers are subject to strict accreditation requirements, and their conduct is monitored by law societies. Most of the objectionable

conduct alleged by witnesses would clearly contravene the ethical rules by which lawyers are bound, and in extreme cases would result in the lawyer being disbarred. However, Members felt there was merit in witnesses' suggestions about standardizing accreditation for other professionals.

Recommendation

31. This Committee recommends that provinces and territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments.

The need for lawyers representing parents to keep the interests of the children in mind was argued by Barbara Chisholm, of the Ontario Association of Social Workers.

Training for lawyers should be broadened to recognize that in family law matters, counsel representing a parent is functioning within the shadow of the children's future. Thus, the obligation to the parent-client is different to that extent from the obligation and other aspects of legal practice. (Meeting #13, Toronto)

This objective was echoed by Winnipeg lawyer Susan Baragar:

I think we need to change some of the canons of ethics that we go by in our professional associations, such that our responsibilities are a little bit different when we are looking at children. I think what we need to do is state that we have a three-part responsibility: we have a responsibility as an officer of the court; we have a responsibility to our client; and we must also have a responsibility to the children, who are unrepresented in this matter. (Meeting #22, Winnipeg)

CHAPTER 5: Complications of High-Conflict Divorces

Legal and mental health professionals recognize that divorce and separation are difficult for all parents and children. For the majority of families this is a difficult transition phase. Some families seem to get stuck at this point, however, with one parent or both intent on maintaining such a degree of conflict and tension that it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces is estimated at between 10 and 20% of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses. They are clearly not in the majority, and a number of witnesses insisted that recommendations made to address high-conflict divorces should not have negative effects on the rest of the divorcing population.

High-conflict couples were described by lawyer Carole Curtis, representing the National Association of Women and the Law:

I describe a high-conflict family as a family that falls short of actual violence or assault but for whom, post-separation, a hostile relationship continues. Perhaps a therapist would call that a dysfunctional relationship. There are many separated families who cannot let go of the need to fight with each other one, two, five, and seven years post-separation. We certainly need to bear those families in mind, but we also need to have realistic expectations about the help the justice system or legislation can give to those families. (Meeting #8)

A number of witnesses included families who have experienced domestic violence in the category of high-conflict divorces.

The Committee was urged to concentrate on developing options to support parents who can make their own arrangements and reach co-operative solutions. However, these types of options, such as mediation, are clearly inappropriate for some high-conflict couples, and the system has to provide alternative remedies where necessary. The challenge for the Committee, and for governments, is to design a system that can accommodate different types of divorce, without penalizing couples in one category through options meant for another type of divorce. A large number of witnesses recognized that high-conflict families consume a disproportionate amount of legal and other resources.

On the other hand, the highly conflicted families are the ones that chew up the court time. In terms of the time that the judge and the personnel that are affiliated with the court put in, these highly conflicted cases do consume a lot of time, so it's important that the systems that are designed have a focus on how to deal with those families. (Thomas Darnton, Visiting Professor, Child Advocacy Clinic, University of Michigan Law School, Meeting #26)

The Committee's findings and recommendations reflect the desire of Members to improve the legal system's response to high-conflict divorces, without imposing any harmful restrictions on the co-operative majority. One of the options Members believe should be considered is a mechanism for screening out high-conflict divorces and treating them in a different stream. This would recognize the potential harm to children whose parents continue their conflict far beyond a reasonable adjustment period. The system should identify these families in order to provide protection for their children, who are at greater risk than most

children of divorce. Once families are identified, their files should be "red tagged" or flagged in some other way, so that decision makers do not make determinations about parenting arrangements without knowing the full details of the case and the family's history.

Barbara Chisholm, of the Ontario Association of Social Workers, recommended that Special Masters be appointed to deal with high-conflict cases.

Such Special Masters should receive particular training in alternate dispute resolution techniques and be prepared to monitor the cases on a long-term basis. Restrictions on the number of adjournments allowed in custody/access disputes should be put in place, as well as restrictions on the number of returns to court. After these limits have been reached, the matter should then be routinely subject to referral to the special master. ... This is a program that has begun in the States and in Australia. It's the appointment of a judge—a qualified, experienced judge—to a special status. It would be a new status of judicial appointment for someone who would receive special training and be available to deal specifically with the high-conflict cases, the ones that come back and back, where people fire their lawyers because they don't like the advice they get and shop for another lawyer and fire that one. (Meeting #13, Toronto)

The Committee recommended creating this specialized judicial role as part of the services offered by unified family courts (see Recommendation 24).

The Committee agrees that the identification and streaming of high-conflict families would be beneficial both for those families and for others involved in the litigation process. These families require specialized services and generally consume more judicial resources than others, which can result in delays in the courts that may have a negative impact on other families. With a significant number of marriages ending in divorce, and the downward trend in the age of children at the time their parents divorce, such disruptions in family life will likely have more profound effects on children, especially in high-conflict cases. The younger age of the children affected has implications for all the therapeutic and other services offered divorcing families, including those offered through the child protection system.

One particularly alarming symptom of a high-conflict divorce is that a child may decide that he or she does not want to visit one parent or the other. Committee Members were profoundly concerned about such cases when they were described to us by witnesses, especially where children told the Committee that they wished to sever a relationship with a non-residential parent. In the view of Committee Members, such a desire on the part of a child is indicative of a serious problem and calls for immediate intervention. A child who acts on such a wish, with the support of the other parent or the judicial system, may in the long term come to regret the choice he or she has made.

Recommendations

- 32. This Committee recommends that federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children.
- 33. This Committee recommends that professionals who meet with children experiencing parental separation recognize that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention.

Many witnesses made a connection between the degree of conflict between divorcing parents and the likelihood that those parents would require supervision of parenting time or become involved with the child protection system. The Committee considered evidence about the supervised parenting programs, or supervised access as it is currently referred to, in place in a number of Canadian jurisdictions. Members also were interested in the interaction between divorce actions affecting children and provincial child protection systems.

A. Supervised Parenting Programs

Where there is reason to believe that an access visit, or parenting time, with a non-residential parent would be in the best interests of a child, but safety or other concerns preclude unsupervised access, the solution is often "supervised access", or what this Committee would prefer to call "supervised parenting". A number of witnesses cautioned that visits that take place under supervision in a community centre or other public facility, with other families and supervisors present, might be awkward and uncomfortable for both parent and child. However, the Committee is convinced that such access is often better than no access, and that supervised parenting programs are an essential component of our response to divorce. Parent-child relationships should not suffer merely because we do not have the resources or capacity to provide supervised parenting. Sally Bleecker, co-ordinator of the Ottawa Supervised Access Program, spoke of the importance of supervised access in facilitating parent-child contact that might otherwise not take place.

All over the world, children have relationships with parents who are less than perfect. Children have a deep attachment, as we know, to parents who they hope will be better. They live often in the hope, as we all do in relationships, and I really think these children benefit from some support to see if those relationships can improve in their lives. (Meeting #24)

The Ontario supervised access program was described by its co-ordinator, Judy Newman:

Supervised access centres, as envisioned by the Ministry of the Attorney General, provide a safe, neutral, child-focused setting for visits and exchanges between children and their non-custodial family members, which can include grandparents as well as parents. Supervised access provides integrity to orders of the court by providing a place for these visits and exchanges to take place, and it supplies, when requested, factual observation notes or reports to lawyers and the court to assist them in making orders regarding custody and access. Supervised access centres are not an assessment setting and they do not make recommendations regarding custody and access. They only provide factual observations and the setting for visits and exchanges to take place. The Ministry currently funds 15 centres on a transfer payment basis across the province of Ontario. In 1997 and 1998 they served 9,000 families and conducted 24,000 visits and exchanges. (Meeting #24)

Two aspects of supervised access raised most often by witnesses were the types of cases appropriate for supervised access and the absence or inadequate capacity of supervised access programs across the country. A number of witnesses talked about how to handle supervised access and the exchange of the child between the parents in domestic violence cases or other cases where the safety of the child or the custodial parent may be at risk.

Supervised access, especially supervision of the exchange of the child between parents, and the use of a neutral location for access should be mandatory in cases where there has been abuse of the custodial parent by the parent exercising access. ... The cost of supervision and the cost for the use of a suitable access location that meets the child's needs should be paid by the parent who

has abused the other spouse. These recommendations related to supervision have the additional benefit of protecting the spouse who has been the victim of abuse from being subjected to further threats, intimidation and abuse. (Elaine Teofilovici, YWCA, Meeting #8)

Claire McNeil, of Dalhousie Legal Aid, told the Committee that although judges are ordering supervised access appropriately, there is no way to provide it, as there is no funding for a supervised access program in Halifax. In some cases, access may be supervised by family members or mutually agreed friends, but such supervisors are likely not appropriate where there are concerns about violence, substance abuse or other safety issues. Even in Ontario, where there are supervised access programs in most major centres, witnesses expressed concerns about inadequate resources, limited availability and the need to expand the program.

Recommendations

- 34. This Committee recommends that the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada.
- 35. This Committee recommends that the *Divorce Act* be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a parent and a child in situations of transition, or where there is clear evidence that the child requires protection.

B. Interaction with the Child Protection System

The Committee's hearings demonstrated the complex interaction that can arise between private parenting disputes and the child protection system. Provincial and territorial child protection statutes govern cases where the state is called upon to intervene in families to safeguard the well-being of children. Each jurisdiction's statute prescribes the conditions under which a child is deemed "in need of protection", thus justifying action by a child protection agency or children's aid society. All statutes specify that the best interests of the child is the governing criterion for decisions. Another universal feature of child protection systems, as the Committee heard from witnesses, is the overwhelming caseloads of child protection workers because of insufficient resources. Child protection clearly calls for increased government attention and resources.

When the Committee considered the interaction between child protection systems and parenting disputes, among the issues raised was how allegations of abuse of children by a parent are investigated. Such allegations are usually reported to a child protection agency, and the ensuing investigation generally has a direct impact on the parenting arrangements in place at the time the results are reported. A number of witnesses argued that false allegations of abuse can be made by one parent hoping to gain an unfair advantage over the other parent in a custody and access dispute. In such cases it is imperative that parent-child relationships be maintained through supervised parenting. Witnesses described the devastating impact of false allegations, maliciously made, on innocent parents; many witnesses reported having endured such experiences personally. The area of sexual abuse of children is extremely complex, and the problem of false allegations of abuse is discussed later in this chapter (see also Recommendation 35).

When a family is involved in both custody/access proceedings and an investigation or action by a children's aid society, the interaction between the two systems can be difficult, sometimes to the point that one interferes with the other. Given the prevalence of separation and divorce, it is inevitable that a significant

proportion of situations coming to the attention of child protection authorities will relate to children whose parents are separated, with or without parenting arrangements.

Such jurisdictional difficulties must not obscure the presence of risk factors that would justify child protection action. The Committee hopes that mechanisms can be developed to ensure that children will not fall through the cracks, escaping the attention of child protection authorities and being denied positive interventions because they are the subject of parenting disputes. Establishing or expanding unified family courts — or courts of a similar nature — across Canada could contribute to resolving this problem, in that cases involving both parenting and child protection would be handled by the same court.

In some cases child protection concerns arise in the course of a custody or access dispute and a child protection agency undertakes an investigation of the family. Occasionally this is conducted before or simultaneously with a custody and access assessment by a psychologist or social worker. As psychologist Rosalyn Golfman indicated to the Committee, the results of the agency's investigation are not always made available to the assessor.

Sometimes they'll let us review how they interviewed the child and sometimes they won't, and we don't know what it depends on. Often we have to get a subpoena from the court, which is a costly, lengthy process. So we'd also like to see some changes in that. If we're doing a comprehensive evaluation, we should be able to review what the child has actually said. (Meeting #22, Winnipeg)

Another key point is that parents who engage in protracted custody or access proceedings may be putting their children at risk, even to the point where the children are in need of protection. Witnesses who recommended amending provincial child protection law, including Heidi Polowin, Counsel to the Ottawa-Carleton Children's Aid Society, advocated expanding the definition of "in need of protection" to include children whose parents are engaged in protracted disputes with respect to custody. This recommendation was also made to a coroner's jury in the Kasonde case, an inquest into the death of two Ottawa children killed by their father, following an acrimonious custody and access dispute between the parents. To

While the jury did not adopt that particular recommendation, it did recommend that the province of Ontario establish a bridging system between child welfare and child custody and access, to clarify the role of child protection agencies in situations like that of the Kasonde family. The jury also recommended that the grounds for finding a child in need of protection be expanded to include cases where the child is exposed to parental abuse, domestic violence, substance abuse, emotional abuse, or neglect that is likely to result in developmental delay or emotional or physical harm to the child.

Recommendation

36. This Committee recommends that the provincial and territorial governments require child protection agencies to provide disclosure of records of investigations to court-appointed assessors examining families who have been the subject of such investigations.

C. Research

Throughout the course of this study, the Committee repeatedly encountered the problem of inadequate or non-existent research on a variety of areas related to divorce, its impact on children, and other questions.

⁷⁵ Verdict of Coroner's Jury, Inquest into the Deaths of Margret and Wilson Kasonde, Ottawa, April 22 — June 24, 1997, Dr. Bechard, Coroner for Ontario (unreported).

When some of Members of this Committee attended the May 1998 Conference of the Association of Family and Conciliation Courts in Washington, D.C., we were impressed that in many U.S. jurisdictions, research on many of these vital issues is being conducted and is widely available to guide policy makers, legislators, judges and parents. The contrast with the Canadian situation seemed stark to many of us.

The Committee has identified the following specific areas that will require further study in the near future in Canada:

- false allegations of abuse and neglect;
- parental alienation;
- the behaviours, patterns and dynamics of domestic violence; and
- parental child abduction.

Members of the Committee were impressed with the scope and potential usefulness of the National Longitudinal Study on Children and Youth, but felt that its data should be expanded and used to investigate a larger list of questions dealing with the impact of separation and divorce on children, including

- the impact of continued contact with grandparents;
- the impact of losing contact with a parent;
- the well-being of children five or ten years after parenting arrangements are made, whether by consent or judicially imposed; and
- the impact on child well-being of an amicable settlement between the parents.

D. Domestic Violence

One of the most dangerous complicating factors in separation and divorce is domestic violence. This was among the most controversial topics presented at the Committee's hearings, and one that Members find most troubling. Witnesses differed about the incidence and nature of such violence — about whether men are more often the perpetrators and women more often the victims, about the incidence of violence instigated by women, about the severity of domestic violence and its relevance to parenting/decisions. Several matters are clear, however. Children who witness violence between their parents are affected negatively. Where there is violence between the parents, the risk of escalation at the time of separation is high and poses real safety concerns for both parent and child. The presence or risk of violence is unarguably relevant to decisions about parenting arrangements. This is a problem that affects a minority of divorcing couples and unmarried separating couples.

Dr. Donald Dutton, a research psychologist who testified before the Committee in Vancouver, has studied violence in intimate relationships for a decade or more. He reminded the Committee that research shows that the majority, 75%, of men are not violent in intimate relationships. Some of his research findings relate to people not concerned with the *Divorce Act* (such as common-law couples), but he did present the following conclusions about violence linked to parenting disputes:

In terms of how this ties into issues around custody and divorce, I have from time to time served as an expert witness in custody matters, divorce matters, where there have been allegations of abuse. In my opinion, these cases really have to be taken on a case-by-case basis.

From looking at our research, the best model obviously is an intact family, but that's assuming two non-abusive parents. If you don't have that, if you have one abusive parent, then it seems to me that the child should then reside with the non-abusive parent. The issue then becomes whether the abusive parent's abusiveness will be played out on the child or is specific to the relationship with the spouse. The research seems to indicate that both can happen. For that reason, again, I think one has to adopt a case-by-case approach to these matters. Trying to be formulaic in terms of gender issues etc., really just does not work. (Meeting #27, Vancouver)

The controversies about domestic violence are many. There is debate about the definition of family violence, its extent, the usefulness of police assault statistics, the profiles of abusers and victims, and the validity of the key tools for measuring violence. While the focus is often on violence between the adult members of the family, there is also concern about abuse of children and elders. Custody and access law has always recognized the relevance of violence or other abuse of the child in decisions about custody and access. For a long time, however, violence between parents, such as one spouse physically assaulting the other, was assumed not to have a direct bearing on the parenting abilities of the assaultive spouse. It was not considered relevant, therefore, to custody and access decisions. With relatively recent mental health research establishing a clear link between spousal violence and child well-being, the courts have begun to recognize the relevance of such conduct for decisions about parenting.

The Committee heard contradictory messages from a variety of witnesses, including academics, mental health professionals, men's and women's advocates, and others. Many argued that family violence is a gendered problem, in that most perpetrators are male and most victims female. Supporting this argument are family violence data from Statistics Canada, including the controversial 1993 Survey on Violence Against Women; police statistics, including those from specialized family violence courts in Winnipeg and Ontario; and administrative data from shelters for women who have been victims of wife assault. In contrast, a number of witnesses argued, on the basis of recent general population surveys, including work by U.S. sociologist Murray Strauss, followed up in Canada by sociologist Reena Sommer, that men and women commit roughly equal numbers of violent acts in relationships. ⁷⁶

The evidence the Committee received reflected these competing schools of thought. For example, Jane Ursel, sociologist with the Winnipeg Family Violence Court, provided data on the caseload before that court:

In the three-year time period that I have the data for you today, there were 5,674 cases of spousal abuse. The court indicates that 92% of the convicted offenders were male and 89% of the victims of those offences were female. ... 562 convictions [for child abuse] in the same time period; 89% of the accused were male and 76% of the victims were female, with the [remaining victims being] male and female children. In the case of elder abuse, 91% of the accused were male and 81% of the victims were female. (Meeting #22, Winnipeg)

The latest data from Statistics Canada, which are based on police statistics, show that in 1996, 11% of victims of domestic violence were male, while the large majority (89%) were female. He were also more likely than women to kill their spouses. The strongest predictors of wife assault are the young age of the couple, living in a common-law relationship, chronic unemployment of the male partner, parties who witnessed abuse as children, and the presence of emotional abuse in the relationship.

Witnesses from the shelter movement stressed the prevalence of abuse of women and the need to assure the safety of abused women and their children, particularly at the time of separation.

⁷⁶ The expression "general population" is used to indicate that the subjects of the study were not involved in the criminal justice system. Sommer's data are derived from interviews with a random sample of 899 individuals, roughly half from each sex.

⁷⁷ Statistics Canada, Family Violence in Canada: A Statistical Profile (Ottawa: Canadian Centre for Justice Statistics, 1998).

⁷⁸ Spousal murder is one statistical area unlikely to be affected by underreporting.

In woman abuse situations, the time of separation is particularly dangerous. As part of the abuser's pattern of control and domination, their victims have usually been told for years that if they ever dare to leave, they, their children, or their families will be seriously hurt or killed. The resulting fear for women is well-founded. (Bina Ostoff, Counsellor Advocate, London Battered Women Advisory Centre, London Coordinating Committee to End Women Abuse, Meeting #14, Toronto)

Most witnesses advocating appropriate responses to violence against women were not suggesting that all family violence is against women, or that men are never assaulted by their spouses. For example, Gary Austin of the London Family Court Clinic recognized the potential for men to be the victims of family violence, but he stressed that the problem of violence against women is more prevalent and serious, both in the nature of the violence and because women are more likely to be financially dependent on men.

Extensive research across North America indicates that 90% of family violence is directed at women and children. We do not condone violence against men and recognize that there are a number of divorces in which women have been the perpetrators of emotional and psychological abuse on men. This form of violence may be under-reported and should lead to comparable remedies [to those] described in this paper if found to be valid. However, violence against women is still a major problem in marital relationships, with significantly more women facing death and serious injury, and with violence by men representing an overall pattern of control and domination in the relationship. (Meeting #18)

Information about female violence is available in anecdotal form, as well as in the results of general population surveys using the Conflict Tactics Scale (CTS), developed by Murray Strauss. That scale was used in Statistics Canada's 1993 Violence Against Women Survey, which was cited by a number of witnesses. They quoted its major finding that 29% of currently or formerly married women had experienced some form of domestic violence. Some Committee Members noted that the same 1993 study reported that the vast majority of women — 97% — had not experienced abuse the year before. The study reported that "Three percent of women were assaulted by their partner in the 12 months prior to the survey." However, the Violence Against Women Survey has been criticized because it applied the CTS only to women and did not ask men about their experiences of violence perpetrated by women. Some Committee Members noted Dr. Murray Strauss's concern about inadequate use of his methodology, the CTS, in the 1993 Statistics Canada survey, quoting Dr. Strauss as having noted the omission of questions about women assaulting men:

That is what the Canadian National Survey of Violence Against Women did. They used the techniques which I developed, the Conflict Tactics Scale. But they left out the half of it which asks about violence by women, so they wouldn't be left with politically embarrassing data. (Meeting #14, Toronto)

Manitoba sociologist Reena Sommer told the Committee about her research focusing on perpetrators of spousal abuse in the general population. She emphasized that her data should not be confused or interchanged with data from the Family Violence Court or other police data. Her research includes types of abuse that might not appear in police statistics, such as emotional abuse.

It tends not to be physical, but when it is, it also tends to be reciprocal, and it is not serious enough to require medical attention. That is why most of the people who report to the general population surveys do not show up in the crime statistics: they don't seek help. (Meeting #22)

Suristat, Statistics Canada, Wife Assault: The Findings of a National Survey, Vol. 14, No. 9 (March 1994), p. 4.

Murray Strauss, "Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scale", Journal of Marriage and the Family 41 (1979), pp. 75-88. See also Murray Strauss and Richard Gelles, Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families (New Brunswick, N.J.: Transaction, 1990).

Including this expanded range of abusive conduct, which goes beyond that generally found in criminal courts and women's shelters, Reena Sommer concludes:

The results of my research have found there are no significant differences between the rates of abuse perpetrated by males and females. They're basically equivalent. That's not to say one is more injured or less injured than the other. I'm just saying there are as many men as there are women who perpetrate abuse against their partners. (Meeting #22)

Jane Ursel offered this explanation for differences between data from the Family Violence Court and data provided by Reena Sommer:

I think that where the difference might lie is that Dr. Sommer is dealing with conflict in a relationship. Studies have been done—I know this has been much discussed at this particular table in another city—such as the Canadian study on violence against women that was done in 1993, where there was an attempt to measure degrees of violence. I would certainly agree that many couples, both members, may have difficulty resolving conflict and may choose strategies that are certainly [less than] optimal. But I believe that when we come to measuring the actual degree of physical harm, there is a difference in assaults of men against women. The magnitude of harm that can be caused typically is greater when it is a male assailant upon a female victim. (Meeting #22)

This distinction between conflict in relationships and domestic violence of a criminal nature is likely the key to understanding the different patterns detected in the data cited. More empirical research would permit a better understanding of the problem of violence in relationships, but Members nevertheless underline their view that when violence in the home puts children at risk, action is called for, regardless of which parent is the aggressor.

Violence against men clearly does occur. The Committee heard testimony from several male witnesses alleging abuse by a spouse. Lyn Barrett, of the Cumberland County Transition House Association, indicated that the transition house offers programs for men as well as women. In the last year, she stated, 110 women had sought help, while only 5 men had done so, 2 of whom were in same-sex relationships. She explained:

We don't ever see men who are suffering the same degree of violence that we see women suffering, and we never see the numbers. That isn't to say that the numbers of men out there who have never come forward because they're embarrassed or whatever don't exist, but we also know that we only touch the tip of the iceberg for women. There's this long history where women could not get help, and that's what we are all here to recognize and support. (Meeting #30, Halifax)

Because of the existence of violence against men, the Committee would not recommend that family law or divorce legislation employ a gender-specific definition of family violence.

Having heard and considered carefully witnesses' evidence on domestic violence, the Committee recognizes that there are compelling reasons for further research into family violence, its incidence, causes, potential preventive measures, and measures to reduce negative effects and protect family members. Some Committee Members noted that insufficient testimony had been presented to the Committee about the actual incidence and role of domestic violence in separation and divorce proceedings. For purposes of this study, however, the most important is research into the effects on children of witnessing violence. This evidence is less equivocal, and the Committee urges all governments to consider it carefully and ensure that the legislation requires that legal and mental health professionals participating in the development of parenting plans do so as well in relevant cases.

Reporting on the work of Peter Jaffe and others at the London Family Court Clinic, psychologist Gary Austin told the Committee that the vast majority of children living in households where there is domestic violence are aware of the violence and are affected negatively by it. There is a link between spousal abuse and child abuse, in that children who live with a violent parent are at greater than average risk of being the direct targets of abuse. Even when there is no direct abuse, witnessing a parent being abused is as harmful to the child as direct abuse. 81

One of the most significant developments in recent years in the field of family violence is the recognition that children who witness or are exposed to domestic violence are affected in a variety of ways. In fact witnessing violence is a form of psychological or emotional abuse that can leave the same adjustment problems as the direct experience of physical or sexual abuse. (Meeting #18)

Several witnesses, including Dr. Austin, recommended legislative action based on the literature establishing the harmful impact on children of witnessing domestic violence. Most of these witnesses advocated amendments to the *Divorce Act* and provincial family law to make domestic violence expressly relevant to custody/access decisions and a matter that must be considered by the judge. In addition, there should be a presumption that parents who have abused their spouses should not be considered for custody, joint custody, or liberal or unsupervised access. Gary Austin cited a model code developed by the U.S. National Council of Juvenile and Family Court Judges in 1994:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of the family violence. (Meeting #18)

As Dr. Austin pointed out, "No gender is implied."

E. Parental Child Abduction

Abduction of a child by a parent is frightening for both the child and the other parent. Where return of the child does not occur, the impact can be devastating.

In 1988 the federal government established the RCMP Missing Children's Registry. As described by Sgt. John Oliver, the Registry is "an internationally recognized law enforcement program devoted to the search and recovery of children." (Meeting #24) The Registry handles approximately 60 new cases each month, a proportion of which are suspected abductions by parents. Sgt. Oliver stressed the danger to abducted children, reminding the Committee that even children in the care of a parent may be at grave risk. He argued that a crucial tool to deal with both international and domestic child abduction is a national registry of custody and access orders. This is one reason for the Committee's recommendation for a registry of shared parenting orders (see Recommendation 20).

Sections 282 and 283 of the *Criminal Code* are available to prosecute parents who abduct children within Canada in contravention of a custody order. However, there is no similar provision dealing with access orders. For the civil enforcement of custody or access orders, parents must rely on the provinces' reciprocal enforcement legislation, and the process can be cumbersome, expensive and awkward for parents living far

Peter Jaffe et al., Children of Battered Women (Newbury Park: Sage Publications, 1990).

from the province to which the abducting parent has fled with the child. Alex Weir, of Child Find Alberta, told the Committee that obtaining the return of a child abducted within Canada is more difficult that securing the return of a child taken to a Hague-signatory country; he recommended that the provinces adopt provisions similar to the Hague Convention to facilitate and expedite the return of children to the province from which they were abducted. The definition of and appropriate response to parental child abduction within Canada require further study. With the recommended transition to a shared parenting regime, the distinction between custody and access should be softened, and sections 282 and 283 of the *Criminal Code* may have to be modified accordingly.

Gar Pardy, the official at Foreign Affairs and International Trade Canada responsible for helping families whose children have been abducted and removed from Canada, made a practical suggestion to facilitate the interprovincial return of abducted children:

When warrants are issued, one thing we would encourage is police jurisdiction to make them national. In many instances, when a warrant is issued for somebody's arrest they are very limited geographically. Sometimes it's very frustrating, because you try to take the fact of a warrant and use it but it doesn't necessarily have any application in a foreign jurisdiction. In a foreign jurisdiction they look at an arrest warrant and say, well, it's only valid for the city of Mississauga. So it's not very influential. (Meeting #24)

Related to the problem of parental child abduction is the unilateral removal of a child from the family home by one parent. Such a move is not considered child abduction in the criminal sense if the parent left behind had no court-imposed custodial rights. In most provinces, current family law provides that such a move disrupts the statutory right of parents prior to separation to shared custodial rights in respect of their children. Nonetheless, unilateral moves of this nature by parents have not generally given rise to remedies in favour of the parent left behind, unless that parent has acted extremely quickly to secure the return of the child through the courts. In some cases, the fleeing parent has been able to rely on the ensuing period of sole care and control of the child as a basis for a sole custody order in his or her favour. The Committee is agreed that this practice, and any resulting litigation advantage, ought to be severely curtailed and discouraged.

The problem of international child abduction was studied recently by the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade. That Committee's report, International Child Abduction: Issues for Reform responds to many of the issues raised by witnesses before this Committee. In November 1998, the Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade was released. In that report, all but three of the Sub-Committee's recommendations were accepted. The Government Response provides the Sub-Committee with a detailed response to the recommendations they made, and was very helpful to this Committee as well. This Committee did not restrict its inquiry to international child abduction, however.

International child abductions are dealt with mainly under the *Hague Convention on the Civil Aspects of Child Abduction*. This Convention sets out straightforward procedures for securing the return of a child abducted from one Hague-signatory country to another. The custody and access order of the original jurisdiction is enforced. Gar Pardy told the Committee that marital breakdown and close family ties in another country are two of the characteristics of cases in which he is involved. He discussed the operation of the Hague Convention and recommended that Canada initiate negotiations to revise the Convention to encourage more countries to sign on. Currently, abductions to non-Hague countries are virtually impossible to resolve, although officials are often able to secure the co-operation of the other country in providing information about the child's location and well-being.

International Social Services Canada offers some assistance to abducted children and their families, even where the child is taken to a non-Hague country. Using a large international network, ISS social workers attempt to facilitate assessment of a child's well-being in the new location, or mediation between the parents. The agency is present in approximately 120 countries. They also provide assistance in custody and access cases that cross international borders.

The Sub-Committee on Human Rights and International Development made a number of recommendations related to passports and travel documents. They asked the Passport Office to review existing measures for processing passport applications for children and examine options to strengthen such measures. In the Government Response, it is pointed out that currently parents can apply either to have a separate passport issued to a child, or to have a child's name added to the passport of either parent. If the parents have separated, only the custodial parent can apply for passport services for a child, and in all cases, the consent of both parents is required. The government indicates that it does not currently plan to require all applicants to obtain individual passports for their children: indeed, such a passport could make abduction easier, if an abducting parent were to obtain possession of it.

Canada has indicated to the International Civil Aviation Organization (ICAO) that it is looking into technology that would allow a dependent child's identifying information and photograph to be printed onto a parent's passport. This type of measure could ensure that children being taken across international boundaries where passports are required are correctly identified. Such passport photographs, should they come to be required, should be updated more regularly than the five-year cycle required for adults, as children's physical appearance changes more rapidly than that of adults. It is the Committee's view that measures to improve the identification of children in passports should be pursued, and that the possibility of insisting on individual passports for all children should be considered further.

Recommendations

- 37. This Committee recommends that the attorneys general of Canada and the provinces, along with police forces and police organizations, ensure that all warrants in child abduction matters provide expressly that their application and enforcement are national.
- 38. This Committee recommends that the Attorney General of Canada work to develop a co-ordinated national response to the problem of child abduction within Canada.
- 39. This Committee recommends that the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent be recognized as contrary to the best interests of the child, except in an emergency.
- 40. This Committee recommends that a parent who has unilaterally removed a child not be permitted to rely on the resulting period of sole care and control of the child, of whatever duration, as the basis for a sole parenting order.
- 41. This Committee recommends that the federal government implement the recommendations of the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled International Child Abduction: Issues for Reform.
- 42. This Committee recommends that the Minister of Foreign Affairs and the Passport Office continue to examine ways to improve the identification of minor children in travel documents and consider further the advisability of requiring that all children be issued individual passports.

F. False Allegations of Abuse or Neglect

At the last appeal, the judge apologized to me, saying 'This poor father. What have we done to him?' What did they do? What did this justice system do to me? I haven't seen my children for now going on nine years... these false allegations do a lot of things to you. The hurt's there. It's like someone ripping your heart out. It will never go away, as some people have told you. You can make as many recommendations as you want, but the scars are here. They're with me until the day I die. My kids? I have to ask friends what they look like. (Kim Cummins, Meeting #20, Calgary)

Individual fathers relating their personal experiences and men's groups from across Canada testified that a tactic used by some parents and their lawyers, in an effort to deny parenting time to the non-residential parent (usually the father), is false allegations of physical or sexual abuse or neglect. These witnesses testified that this is a major problem that not only leads to denial of parenting time but also contributes to estrangement and alienation between fathers and their children. In some cases this estrangement becomes permanent. Estrangement may be avoided by maintaining contact between parent and child through supervised parenting (see Recommendation 35).

Several witnesses referred to the court decision in the case of Reverend Dorian Baxter, who appeared before this Committee in Toronto. The decision quoted the trial testimony of Barbara Chisholm, an experienced professional in the field of child abuse, who also appeared before the Committee in Toronto:

Ms Chisholm indicated that the experience has been for some time that sexual assault allegations made by the mother against a father in custody disputes are prevalent nowadays and indeed have become what she called the "weapon of choice." 82

In situations where allegations are made, the father faces the difficult if not impossible task of trying to disprove something that may not have happened.

The problem is that it's never disproven. It's very difficult. That's the Catch-22. It's not provable, but it really stays on the record as something that happened. It's like where there's smoke, there's fire, so something must be happening. (Dory Gospodaric, Second Spouses of Canada, Meeting #13, Toronto)

This takes time and money, and the Committee heard many painful stories from fathers who had lost contact with their children for extended periods of time. In several cases, contact was never restored.

Let me tell you the story of this necklace. Ten years ago I made a commitment to my daughter that on her twenty-first birthday I would give her a pearl necklace. About a month ago I went shopping for this necklace. The sales assistant inquired who it was for and what she liked to wear. I told it was for my daughter's twenty-first birthday but I couldn't tell her what she generally wore or how she liked to dress. After selecting the necklace, the sales assistant stated that it was very beautiful and that my daughter was very lucky, and that she was sure my daughter would like it very much. I just said, 'I probably will never know. I haven't had any communication with her in over seven years.' (Stan Gal, Meeting #13, Toronto)

Witnesses, including individuals, lawyers and other professionals, identified several ways that false allegations can be introduced into the legal system when parents are in conflict over their children. Allegations of abuse or neglect are often made to a child protection agency, or they are introduced through

⁸² B(D) v. The Children's Aid Society of Durham, Ont. Ct. (Gen. Div.) unreported, court file No. 20962/87, March 23, 1994.

affidavits and pleadings submitted by the lawyer of the parent making the allegation. False allegations can also take the form of perjury in sworn written and oral testimony.

In a submission to the Committee from Parents Helping Parents, a Winnipeg organization established by Louise Malenfant to help parents experiencing family law problems, she reported that there has been a problem with the over-validation of false allegations of sexual abuse arising in divorce cases in Manitoba.

The problem of false allegations during divorce proceedings was extensive in Manitoba, as it was acknowledged by the CEO of the Child and Family Services in Manitoba that 25% of all investigations arose during divorce proceedings. In June of 1996, executive at Winnipeg CFS also admitted that only 15% of allegations made in divorce cases were likely true. (Meeting #22)

Heidi Polowin, Director of Legal Services for the Children's Aid Society (CAS) of Ottawa-Carleton gave the Committee the "rough statistic" that three of every five cases of alleged abuse the CAS investigates involve custody and access, and of those three, two are found to be unsubstantiated. Ms. Polowin noted that reports to the CAS are made by neighours, doctors, teachers, and other relatives, as well as parents, and she was careful to note that "unsubstantiated" does not necessarily mean that an allegation is false: it means that the CAS was unable to verify the claim for any one of a variety of reasons.

I wouldn't want to suggest that when we say two out of the three allegations are not substantiated, we're saying they're false allegations. We're saying that we can't substantiate the allegations. They are two different things. I think that when you use the words "false allegations", there's an intentional element there. And that isn't always there. Sometimes the allegations just cannot be substantiated by us. (Meeting #24)

Following on Ms. Polowin's point that not all unsubstantiated allegations are false, the mental health literature contains many articles providing conflicting data about rates of false allegations in cases reported to child welfare and protection agencies.

The complexity of investigating and proving allegations of child sexual abuse was alluded to by Rosalyn Golfman, a psychologist who testified on behalf of a group of psychologists and social workers who do private custody/access assessments and specialize in cases involving allegations of child sexual abuse.

With regard to allegations of sexual abuse, particularly in young children under the age of five, we have found a relatively small but significant number of false allegations of sexual abuse following the dissolution of a relationship. False allegations may occur in highly conflictual separating couples. It is our collective experience that parents and children may misinterpret or may have distorted or misinformed perceptions of the child's relationship to the ex-partner. Young children are highly susceptible to false memories and inaccurate reporting when they are asked repeated questions and when they are retelling the story many times, when they're asked leading questions. Also, one parent's anxiety regarding the abuse may subtly affect the child's accurate reporting abilities. That's the most significant point, really. It's quite subtle. Parents may observe behaviours in their children that could indicate sexual abuse, but frequently these same behaviours could also be explained by the aspects of a conflictual relationship or the trauma of separation. Often these resemble post-traumatic stress disorder. (Meeting #22, Winnipeg)

Some of the debate focuses on the question of children's ability and tendency to lie about such serious matters. For a long time, many practitioners argued that children were incapable of lying in these situations, or at least that it was unlikely that they would lie about abuse. Therefore, any comment suggesting that abuse had occurred could be seen as sufficient reason to justify reporting suspected abuse.

In 1984, Berliner and Barbieri reported that "there is little or no evidence indicating that children's reports are unreliable, and none at all to support fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults." In another study, Dziech and Schudson concluded: "Children do not commonly make false claims of being sexually abused. Underreporting and denial are far more common... The adult notion that children lie about sexual abuse is illogical to those who have studied them." ⁸⁴

More recently, however, other studies have concluded that children may say whatever is expected of them by people they love, especially when asked repeatedly to talk about a difficult problem. Ceci and Bruck wrote in 1993, "children can be led to make false or inaccurate reports about very crucial, personally experienced, central events." The factors that might influence children's reporting of difficult experiences are complex, contributing to the inherent difficulty of investigating reported child abuse, especially sexual abuse.

In a comprehensive review of research studies investigating the frequency of allegations of sexual abuse, Judith Adams reported: "The context in which the allegations arose appears to be critical. Call (1994) reviewed 7 studies of the rate of allegations of sexual abuse arising in divorce cases and found that the rates ranged from 15% to 79%. Ceci and Bruck (1995) cite several studies of allegations of sexual abuse arising in divorce cases, in which rates fall conservatively in the range of from 23% to 35%." Allegations made by children are often made to custodial parents, who are responsible for determining whether to report the matter, ask that it be investigated, or otherwise intervene to protect the child. Not surprisingly, this area becomes even more difficult during separation or divorce proceedings.

In a 1994 article about alleged child sexual abuse in custody and access disputes, lawyer Lise Helene Zarb reported that child sexual abuse is pervasive in Canadian society, while its exact extent is unknown. ⁸⁷ She discussed the disadvantages to the parent who makes a false allegation of abuse, including potential liability for failing to protect the child and the risk of jeopardizing custodial rights if found to be an "unfriendly parent", in addition to extra hassle and legal expense. Problems for the courts are also serious, Zarb concluded, in that there are no guidelines for judges assessing such allegations or legislative guidance about the amount or type of access that should be given.

In a paper submitted to the Committee in June 1998, Professor Nick Bala reviewed the difficulties inherent in researching false allegations of abuse. Reproportion of abuse allegations that are false varies over time and is exceedingly difficult to quantify in a useful way. As Professor Bala points out, a common defence of genuinely abusive men is to dismiss their partners' allegations as deliberate fabrications, or to attribute children's expressed fears about access visits to their mothers' alienating behaviour. Most important, the societal problem of male abusers denying abuse is more serious than the problem of women exaggerating or falsifying claims of abuse. Each case must be dealt with on its own facts, and judges will often be assisted by expert evidence to distinguish between false allegations and those with some foundation.

⁸³ L. Berliner and M.K. Barbieri, "Testimony of the Child Victim of Sexual Assault", Journal of Social Studies, Vol. 40 (1984), pp. 125-137.

⁸⁴ B.W. Dzietch and C.B. Schudson, On Trial: America's Courts and their Treatment of Sexually Abused Children (Boston: Beacon Publishers, 1989).

⁸⁵ S. J. Ceci and M. Bruck, "The Suggestibility of the Child Witness: A Historical Review and Synthesis", Psychological Bulletin, Vol. 113 (1993), pp. 403-429.

Judith K. Adams, "Investigation and Interviews in Cases of Alleged Child Sexual Abuse: A Look at the Scientific Evidence", Issues in Child Abuse Allegations, Vol. 8, No. 3/4 (1989), p. 136.

Lise Helene Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child?", *Canadian Journal of Family Law*, Vol. 12, No. 1 (1994), p. 92.

Nicholas Bala, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach", 3 June 1998, paper submitted to the Special Joint Committee on Child Custody and Access.

Whatever the actual number, false allegations cause grief and pain for the accused parent. The Committee heard testimony from many fathers who had been the subject of accusations that were not substantiated and who had been ruined financially, socially, and emotionally.

These false allegations place all the onus on the accused, whose life instantly becomes destroyed psychologically, economically and socially, and creates an immediate severance of the accused parent from further contact with their children, and that was the purpose of the false allegation in the first place. It allows the game to be played and the game is very effective. I want again to play a positive part in the lives of our children. One false allegation has destroyed that possibility and I'm not hopeful that I'll be re-united with our children. (Larry Shaak, Meeting #21, Regina)

Other fathers who testified added their own observations about the painful consequences of false allegations made deliberately or maliciously by their former spouses. Tony McIntyre, of Men Supporting Men Inc., described his experiences helping such men in British Columbia.

We have heard accounts of men who feel helpless in the face of unproven allegations made against them. It appears that the simple fact these allegations are made by a woman against a man is enough for social service workers and legal professionals to give the benefit of the doubt to the woman and act against the man as if the allegations were already proven. This kind of frustration coming on the heels of grief and loss of close relationships and the pain of being separated from children often leads to the rapid unravelling of many areas of a man's life. They cannot function properly at work and so may lose their jobs. Without money they lose much of their ability to access the legal system. They then approach the agencies as a last resort, agencies designed to help people in this predicament, only to be met with closed doors and cold shoulders. ... There is no greater violence to a decent person's character than false allegations of sex abuse against children. Consequences for the individual can be devastating while they set out to prove their innocence. (Meeting #19, Vancouver)

Witnesses who raised the problem of malicious allegations of abuse suggested that the current system of investigating such complaints is inadequate and adds to the severity of the problem. These witnesses were concerned that in some extreme situations, some parents might be counselled by lawyers or other professionals to make a false allegation as a way of promoting their case for restrictions on the other parent.

My position is that assessments are being used to deprive children of meaningful relationships with both parents. They're being misused. They're being informed by a political attitude that sees a woman's word as much stronger than a man's; that on the basis of an accusation a man cannot clear himself. It doesn't matter if he passes a psychological assessment, a lie detector test, or even a penile measure for child abuse. He could still be on a child abuse register and prevented from seeing his children, except under the most rigorously supervised conditions, when he has done nothing wrong. I'm well aware that abuse exists. In 15 years of consulting with the Children's Aid Society, I know that children are abused sexually, physically, emotionally. That's why I feel it is so important not to give credence to false allegations, especially when children's lives and futures are at stake. (Marty McKay, Clinical Psychologist, Meeting #13, Toronto)

Other witnesses suggested creating a criminal offence of making intentional false allegations of child abuse. Reverend Dorian Baxter, of the National Association for Public and Private Accountability, offered the following recommendation:

[Because of the devastating personal and financial repercussions for the falsely accused] I think there needs to be some way of checking and balancing what the present social services have to offer. I see that as being a civilian child protection or welfare review board made up of well-to-do people, professional people, who are well respected and are prepared to give of their time to determine whether this has any merit. (Meeting #14, Toronto)

Unwarranted allegations by one parent against another must be discouraged. At the same time however, many Committee Members were concerned that any changes introduced to discourage false allegations must not limit, interfere with or restrict the voicing of legitimate concerns for a child's safety, even if they were subsequently shown to be unsubstantiated. Members of this Committee hope that reducing conflict in divorce will reduce the incidence of intentional false allegations. Among the most promising mechanisms for reducing conflict is parenting education during the divorce process. Such programs offer parents concrete skills for use in post-separation negotiations about the children and ensure that all are fully informed about the harm caused by unwarranted allegation of abuse.

While the Committee is convinced that the safety of children must be the principal consideration, Members believe that a legal remedy should also be available to deal with false allegations of abuse. Some members also suggested that the incidence of false allegations in custody/access conflicts warrants a thorough exploration of how affidavits are taken in family law, how pleadings are made, and how solicitor-client privilege may let counselling to make false allegations go undetected.

A number of governments in the United States have enacted legal prohibitions on the false reporting of child abuse or neglect. Statutes in 22 states and the District of Columbia set out penalties for false reports, usually false reports made "knowingly" or "willfully".⁸⁹ Penalties take the form of fines or imprisonment in most cases. Similar penalties can be imposed in all states on those who knowingly or intentionally fail to report suspected child abuse or neglect.

G. Action on Perjury in Civil Courts

In describing their personal custody and access experiences, a number of witnesses alleged that the other party to their dispute had either sworn a false affidavit or been untruthful in giving evidence. Family law disputes, particularly those related to custody and access, tend to turn on the credibility of the parties, who are often the key witnesses. Even the most truthful parties have their own unique perception of events during and after a marriage. Judges often have a difficult time sorting out which version of events to accept, especially if all the evidence is in the form of affidavits. Often judges will be unable or unwilling to make precise determinations about which party is telling the truth about each and every matter raised, but will draw general conclusions about which evidence is preferred.

Witnesses stressed the damage inflicted on already strained family relationships in cases where the parties' evidence contains inflammatory untruths about each other. To the extent that there is a public perception that lying in family law matters is accepted, or at least not challenged, there is damage to the credibility and reputation of the family law system and the courts. Deborah Powell, representing Fathers Are Capable Too, cited a speech by Justice Mary Lou Benotto on ethics and family law, in which she referred to a comment in the first report of the Ontario Civil Justice Review, to the effect that

the single greatest complaint about lawyers by members of the public was with respect to the damage to family relationships caused by the allegations in these affidavits — where, it is widely acknowledged, perjury is rampant and, moreover, goes unpunished. (Meeting #7)

Indeed, there may be family law cases in which false testimony should be challenged. The Committee recognizes that knowingly making a false statement under oath or by affidavit is an indictable offence under

⁸⁹ National Clearinghouse on Child Abuse and Neglect Information, "Reporting Penalties", Statutes at Glance Fact Sheet, p. 1.

the *Criminal Code*. ⁹⁰ The elements of the offence include the falseness of the statement, that the accused person knew it was false, and that the accused person intended to mislead. These elements demonstrate that only very deliberate, clear falsehoods are susceptible to challenge using the *Criminal Code* offence of perjury. One party's perception of dishonesty will not always justify a finding of perjury, however. Indeed, differing versions of events are the rule, not the exception, in family law, given the nature of the proceedings, the degree of acrimony between the parties, and the fact that most incidents were observed only by the parties to the action.

In addition to the *Criminal Code* offence of perjury, two other Code provisions have potential application to false allegations of abuse or neglect. These are the sections dealing with public mischief and obstruction of justice. Section 140 of the Code provides that the offence of public mischief is committed when someone causes a police officer to initiate or continue an investigation by making a false statement accusing another person of committing an offence. Section 139 makes it an offence to attempt wilfully to obstruct justice in any manner.

Both offences might have application to deliberate false allegations of abuse or neglect, as might sections 131 and 132 dealing with perjury. In the Committee's view, the efficacy of these provisions in dealing with false allegations should be studied by the Minister of Justice. This examination should determine whether the three current provisions are sufficient to deal with the problem of false allegations of abuse or neglect, whether their effectiveness might be enhanced by adopting a new charging policy, or whether a new, more specific provision is required.

Recommendation

43. This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury.

H. Parental Estrangement and Parental Alienation

A number of witnesses testified about how they became estranged from their children after divorce. Most of these situations were described by fathers, but some grandparents and a few mothers gave details about how a relationship with a child had been interfered with in the course of a dispute between the parents after divorce. One young woman from Vancouver told the Committee a wrenching story about how she and her brother had become estranged from their mother after their father removed them from her care. This young adult described how negative stories about her mother were told over and over again until she and her brother began to believe them.

In some of the situations, one parent made false allegations to police, child protection agencies, or the courts as a way to keep the other parent from having time with a child. In other situations, one parent poisoned the child's mind against the other parent by implying that the other parent was dangerous. In such cases, the child often becomes distrustful of the other parent and asks that time with that parent be restricted or even that all contact cease. Members of the Committee were struck by the pain created by these situations for both the child and the estranged parent.

⁹⁰ Sections 131 and 132.

Other witnesses who described estrangement from their children suggested that they were struggling against parental alienation syndrome. These witnesses referred the Committee to research by a U.S. child psychiatrist, Dr. Richard Gardner, who defines parental alienation syndrome as a pattern in which one parent, deliberately or otherwise, alienates the children from the other parent. Some witnesses referred to this as a psychological syndrome; others called it a symptom or disorder.

Mental health professionals have used the term parental alienation for many years, but it was Dr. Richard Gardner who brought the term to public attention and proposed that it be considered a syndrome. In his book, *The Parental Alienation Syndrome*, Gardner defines parental alienation as "a relationship disturbance in which the children are not merely systematically and consciously brainwashed, but are also subconsciously and unconsciously programmed by one parent against the other." Gardner claimed further that this syndrome occurs to some degree in 90% of custody conflicts. 92

This statistic, in particular, has resulted in a great deal of debate in the legal and mental health communities. Few question that parents may attempt to alienate their children from the other parent, but many professionals doubt that it occurs as aften as Gardner suggests. Other critics believe that Gardner's work is being used to argue that any child who wishes to sever a relationship with a non-residential parent, or at least reduce contact time, must have been alienated deliberately by the custodial parent. These critics argue that there may be other valid explanations for the estrangement of a child from a parent that could be obscured by misapplying Gardner's theories.

As Peter Jaffe and Robert Geffner caution, professional recognition of a 'parental alienation syndrome' could prevent the evaluation of each case on its own merits, obscuring the real problem between a parent and child, possibly to the detriment of the child.⁹³ This is particularly worrisome in the light of research demonstrating that

Many judges, police officers, social workers and mental health professionals who do not have much specific training in the area of domestic violence and child maltreatment are more likely than those with such training to believe that many false allegations of sexual abuse are made in divorce cases. ⁹⁴

If a child discloses abuse by the non-residential parent, the parent who acts on this information risks being seen as raising the allegation in an attempt to alienate the child from the other parent. Jaffe and Geffner point out that Richard Gardner raised this same caution himself:

Even Gardner (1996), who coined the term parental alienation syndrome, has raised concerns about the abuse of this diagnosis and the danger of professionals being premature in their

⁹¹ Richard A. Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (Cresskill, N.J.: Creative Therapeutics, 1992).

Many of the other criticisms focus on Gardner's claims about frequency and his research and qualifications. Cherie Wood summarized these concerns: "Gardner is self-published. This means that he has based his ideas solely on clinical impressions from his own cases and has not had his work reviewed by independent professional peers...Gardner's statistics do not match those found in national studies." (Cherie L. Wood, "The Parental Alienation Syndrome: A Dangerous Area of Reliability", Loyola of Los Angeles Law Review, Spring 1994.)

⁹³ Peter G. Jaffe and Robert Geffner, "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals", 1998, pp. 380-381.

⁹⁴ M.D. Everson, B.W. Boat, S. Bourg, and K.R. Robertson, "Beliefs among Professionals about Rates of False Allegations of Child Sexual Abuse", *Journal of Interpersonal Violence*, Vol. 11, pp. 541-553, cited in ibid., p. 380.

assessment and custody plans.95

There is a link between the issues of false allegations of abuse and parental alienation. Some argue that false allegations against a non-residential parent indicate that the other parent is engaging in parental alienation. The incidence of false allegations made willfully in the context of custody and access conflicts is widely disputed. Many witnesses testified that it was a common occurrence. The social science literature largely fails to support that contention. Thoennes and Tjaden investigated 9,000 divorce cases and found that less than 2% involved allegations of abuse. Interestingly, this study also showed that of these allegations, 48% were brought by mothers against fathers, 30% were brought by fathers against mothers and their new partners, and 22% were brought by third parties against mothers or fathers. 96

Witnesses argued that false allegations of abuse are a symptom of high-conflict divorces, but it is not clear from the literature that such allegations are made more frequently in the context of custody and access disputes than at other times. Jon Conte wrote in 1992: "As of the writing of this article, I am not aware of a single empirical study that has documented that in fact false cases of sexual abuse are more likely to arise in divorce/custody cases." ⁹⁷

As a result of criticism of his research and the possible over-application of parental alienation syndrome in the United States, Dr. Gardner published an *Addendum* to his book in 1996.

I have seen reports of mental health professionals dealing with mild and moderate cases of PAS as if they were severe, injudiciously and erroneously, then transferring custody to the father, and even putting the mother in jail whose levels of indoctrination are minimal and might even be reversed once they had the reassurance that they would remain the primary custodial parent. I have seen cases in which the courts and mental health professionals have assessed PAS on the basis of the mother's indoctrination, and not the degree to which the programming process has been successful in the child. In such cases the children may have exhibited only mild PAS manifestations, but the mother was treated as if the children were in the severe category and therefore deprived of custody. 98

In addition to the personal stories of fathers, the Committee heard testimony from two Canadian researchers on the subject of parental alienation. Professor Glenn Cartwright of McGill University argued that Dr. Gardner's statistics provide an accurate picture of what happens in many divorced families.

Parental alienation syndrome is extremely serious, and I'm using very strong language here. It's nothing less that the symbolic killing of the non-custodial parent in the life of the child. It not only kills the non-custodial parent; it kills the grandparents and the aunts, the uncles, the friends and so on. One half of the child's family disappears from view and the child is not able to grieve that loss. (Glenn Cartwright, McGill University, Meeting #16, Montréal)

Pamela Stuart-Mills, of the Parental Alienation Information Network, referred to children who are alienated from a parent as "children of the lie", because they are prevented from understanding the real reason for the excluded parent's absence from their lives. Ms. Stuart-Mills also pointed out that parental alienation does not happen only to fathers.

⁹⁵ Ibid., p. 380.

Nancy Thoennes and Patricia Tjaden, "The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" Journal of Child Abuse and Neglect, Vol. 14 (1990), pp. 152-153.

Jon R. Conte, "Has This Child been Sexually Abused? Dilemmas for the Mental Health Professional Who Seeks the Answer", Criminal and Justice Behavior, Vol. 54 (1992), p. 62.

⁹⁸ Richard A. Gardner, Addendum III: Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in their Children (Cresskill, N.J.: Creative Therapeutics, November 1996).

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I would also remind you that everything you hear from the men's groups applies to women too, except that the women are too ashamed of the rejection and the separation from their children that many of them are afraid to come forward because of the social stigma attached. We have such an apple pie picture of motherhood that many women have failed to come forward and have failed to contest their rights before the courts simply because of the social stigma. (Pamela Stuart-Mills, Parental Alienation Information Network, Meeting #16, Montréal)

Members of this Committee took the evidence about parental alienation very seriously but are also conscious of concerns about the preliminary state of research on this problem. The main recommendations advanced by witnesses would encourage more research, more education about the dangers of parental behaviour that could cause alienation, and training for professionals working with separating and divorced families.

Recommendation

44. This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem.



CHAPTER 6: Aboriginal Concerns

The Parliament of Canada has authority under section 91(24) of the *Constitution Act*, 1867 to legislate in relation to "Indians, and Lands reserved for the Indians". This power has been exercised in the passage of the *Indian Act*, which sets out a complex system for registering Indians, administering their lands and regulating their lives. Since its passage, there has been a distinction in terms of the legal regime, and the benefits provided under it, between "status" and "non-status" Indians. From 1955 to 1985, for example, a registered (or "status") Indian woman who married a non-registered or non-Indian man forfeited her status, as well as that of any children she had, under the *Indian Act*. Such provisions do not affect Inuit, Métis people, or "non-status" Indian people.

Aboriginal organizations have worked for many years to make Canadians aware of the social and health problems affecting Aboriginal people, whether or not they live on reserves. Housing continues to be inadequate for many, and most reserves have insufficient housing availability. Many rural and remote reserves lack running water, sewage and indoor plumbing, and there is a high rate of fires. The health situation of status Indians is startlingly poor, with Indian children facing a much shorter life expectancy than the general population. Labour force participation is very low in many areas, and Aboriginal persons are three times more likely than non-Aboriginals to spend time in federal penitentiaries. 99

In her appearance before the Committee, Ethel Blondin-Andrew, Secretary of State for Children and Youth, made clear that it is partly their predominance in Aboriginal communities that makes children such a precious responsibility for Aboriginal peoples.

Aboriginal children make up a larger proportion of their communities. About 40% of Aboriginal children are under 15, compared with 20% of non-Aboriginal Canadians. This is from the 1994 census. The Canadian Institute of Child Health has noted that while the bulk of Canadian population is aging into retirement years, the majority of Aboriginal population is aging into reproductive years. Furthermore, Aboriginal women are having more children and at a younger age than non-Aboriginal women. (The Honourable Ethel Blondin-Andrew (Secretary of State (Children and Youth)), Meeting #45)

Ms. Blondin-Andrew also referred to cultural traditions that place children in the centre of very close extended family structures. In addition to pointing out the importance of children to these communities, the Secretary of State expressed her concern about the lack of statistical information about the well-being of Aboriginal children, particularly those affected by parental separation or divorce. The Committee appreciated this input, and suggests that the problems faced by Aboriginal children affected by family disruption could be studied by the Standing Senate Committee on Aboriginal Peoples as part of its study on Aboriginal governance.

There is no federal law that addresses the relationship between status Indians and most aspects of the general law, such as family law. Therefore, Aboriginal people, including status Indians, are governed by the *Divorce Act* when they seek divorce and corollary relief, and by provincial family law for other matters such as division of property. Provincial matrimonial property law may determine the rights of ownership and possession of the moveable property of Indian persons living on reserves, but provincial laws cannot affect

⁹⁹ Bradford W. Morse, ed., Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1991), p. 6.

ownership or possession of reserve land. ¹⁰⁰ Courts are unable to apply provincial laws to order partition and sale of reserve lands. However, a court can make an order for compensation for the purpose of adjusting the division of family assets between the spouses. ¹⁰¹

Provincial child welfare laws also apply to Indian people living on reserves. Child protection matters are dealt with under provincial law, although a number of jurisdictions have developed separate child protection agencies to serve their Aboriginal populations. Aboriginal children have been over-represented in the child welfare system. There is the potential for controversy when the interest of the Aboriginal community in exposing the child to Aboriginal culture is in conflict with the provincial child protection agency's concerns about the other needs of the child.

The 1996 report of the Royal Commission on Aboriginal Peoples highlights the assertion of control over child welfare by the Spallumcheen First Nation Community near Vernon, British Columbia. Chief Wayne Christian, who himself had been in foster care, was moved to action following the suicide of his brother, who had tried unsuccessfully to become reintegrated into the community after a period in foster care. Chief Christian led his community in passing a child welfare by-law in 1980 under the authority of the *Indian Act*. The federal government was persuaded to refrain from overturning it, and the government of British Columbia agreed to co-operate, under pressure from the Aboriginal community. Spallumcheen remains the only First Nation community to have achieved this degree of autonomy in child welfare administration. ¹⁰²

Adoption is another area of concern for Aboriginal people, because provincial adoption laws may conflict with cultural traditions around adoption, particularly among Inuit. Case law has held that Indian customary laws or provincial laws may apply to the adoption of Indian or non-Indian children by Indian parents. An adoption of an Indian child by Indian parents does not affect the original band membership of the child, unless a band membership code alters this basic rule. There is also case law permitting adoption in accordance with Inuit custom. ¹⁰³

In addition to child protection matters and family violence, the Royal Commission's recommendations related to children and families included the following: that governments acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements; that governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly; and that governments engage in consultations with Aboriginal nations or organizations regarding other problems related to family law.

The Committee heard from several witnesses in its travels across Canada who raised concerns related to Aboriginal peoples. Also represented were the Métis National Council of Women, Pauktuutit (the Inuit Women's Association), the Native Women's Association of Canada, the Assembly of First Nations, and the Métis National Council. These witnesses, from diverse communities and representing the perspectives of both men and women, raised a number of important and complex issues. They stressed to Members the inapplicability of many features of the custody and access decision-making system — and the inaccessibility of many of the supports society offers to those experiencing separation and divorce — to those living in rural, impoverished or remote locations, such as the far north. This is especially so if their language is neither English nor French. Standards and criteria that may be appropriate for families who are part of the majority population in urban communities may not be so for members of such isolated communities.

¹⁰⁰ Jack Woodward, Native Law (Toronto: Carswell, 1996), p. 129.

¹⁰¹ George v. George (1992), [1993] 2 C.N.L.R. 112 (B.C.S.C.).

¹⁰² Royal Commission on Aboriginal Peoples, Report, Vol. 3 (1996), available on-line at http://www.indigenous.bc.ca/rcap/rcapengv3/ch1&2-vol3.doc.

¹⁰³ Woodward, pp. 348-349.

The impact of poverty on people in strained circumstances brings additional complexity. In addition, often the most difficult cases relate to mixed Aboriginal and non-Aboriginal couples, where intercultural conflict may be added to the conflict experienced by any separating couple. Resolving these multiple issues requires study beyond that undertaken by this Committee. There is also an urgent need for a broader consultation on these issues than the Committee was able to offer.

In the evidence from Aboriginal organizations and individuals, several interesting themes emerged and were often enlightening for Members in a broader sense. For example, a number of witnesses proposed a round table or "sentencing-circle" model of decision making, akin to traditional Aboriginal models, whereby elders, grandmothers, parents and other interested parties could come together to make decisions about parenting arrangements. As Marilyn Buffalo, of the Native Women's Association of Canada recommended:

We are advocating sentencing circles for our people. I would say that the same would apply in the case of family law. Some sanity has to be brought into it and the only place you will find sanity is in spirituality. The elders should take the lead. If you call the elders first, you will not have problems. The grandmother should also have a say in that circle. (Meeting #37)

The critical importance of children and extended families was stressed by Art Dedam of the Assembly of First Nations:

First Nations' families and communities have since time immemorial placed the well-being of the child as their focus. The child, in any matter before the community, is respected. The child is held as sacred and as one that holds our future. A child's welfare was inherent in the life of First Nation communities. The assistance of family and/or community members in taking care of a child was common, and still is today. The extended family was available as a support system for the raising of children, and still is today. The extended family remains a strong reality in First Nation communities. (Meeting #37)

There was support for more research into the specific family-law related needs of Aboriginal communities. There was also support for the concept that the best interests of the child should be the paramount consideration in decisions about parenting arrangements and that resources for families should include counselling, mediation and other therapeutic interventions as needed. Training for professionals and judicial education should include issues related to the lives and needs of Aboriginal persons, especially as geographically appropriate. The importance of legal aid availability, the need for child advocates, and consideration of grandparents' roles were also raised.

Consideration of all of these issues will require further study and consultation and will ultimately be to the benefit of all Canadians.

Recommendations

45. This Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way.

¹⁰⁴ Sentencing circles are already used in some criminal law cases.

46. This Committee recommends that the federal government include as the basis for such consultations the family law-related recommendations of the Royal Commission on Aboriginal Peoples and work toward their implementation as appropriate.

CHAPTER 7: Sexual Orientation, Religious and Ethno-Cultural Minorities, and Canadians Living Abroad

The first five chapters of this report were directed to, and written in contemplation of, the so-called "general population" of divorcing couples. The racial, ethnic, religious or other character of individuals involved in divorce has not been critical to the analysis presented, or relevant to the Committee's recommendations. The Committee recognizes, however, that in many circumstances, families have racial, ethnic, religious or other characteristics that affect their experiences during separation and divorce. Such characteristics should be recognized and accommodated within the legal system and may in some cases require customized options or responses. This chapter looks at four groups identified by the Committee through its hearings and the preoccupations we heard about these communities and divorce.

A. Sexual Orientation

The issue of sexual orientation, as noted by Professor Katherine Arnup, is relevant to the Committee's work:

The primary [way] is in the context of the breakdown of a heterosexual relationship when there's a revelation of lesbianism or homosexuality on the part of one or both of the parents. Here, judges are faced with the task of assessing the potential impact of sexual orientation on the welfare of the children involved. (Meeting #10)

Witnesses representing Égale (Equality for Gays and Lesbians Everywhere) advised the Committee that society under-appreciates the number of gays and lesbians who are involved in a parenting role. In considering gay parents, the courts are called upon to "deconstruct stereotypes or disprove myths", in the words of lawyer Cynthia Petersen, about the quality of parenting by gay and lesbian individuals. Ms. Petersen discussed the evidence presented in the recent Ontario adoption case, *Re K.*, in which the empirical evidence from the social sciences literature was reviewed extensively and a determination made that no qualitative difference in parenting between heterosexual and same-sex couples could be demonstrated. ¹⁰⁵

Witnesses who testified about same-sex couples and parenting issues wanted to remind the Committee that the sexual orientation of the parent should not be considered, in and of itself, relevant to determinations about parenting abilities or parenting arrangements. With respect to same-sex couples and their parenting roles, the witnesses urged the Committee to recommend that they should have the same range of relationship options as heterosexual couples have. It is the Committee's view that the former issue — the equality rights of gays and lesbians in family law — as in other contexts, is guaranteed under the *Canadian Charter of Rights and Freedoms* and does not call for any specific Committee recommendation. The latter, the relationship options of same-sex individuals, goes beyond the scope of this study but is certainly a matter for future consideration elsewhere.

Recommendation

47. This Committee recommends that sexual orientation not be considered a negative factor in the disposition of shared parenting decisions.

^{105 (1995) 23} OR (3rd) (Ont. Ct. (Prov. Div.)).

B. Religious Minorities

Canadians are also protected under the Charter from discrimination or unequal treatment on the basis of their religion. Religion can become a contentious point of conflict between separated or divorced parents, however, particularly where one parent's religion requires onerous observances or practices. The Supreme Court of Canada has been called upon to rule in two separate cases involving the religious freedoms of non-residential parents. ¹⁰⁶ Unfortunately, although the two cases involved very similar facts, the Court came to contradictory conclusions. Since then a number of commentators have remarked that the decisions provide little guidance for the courts or for parents in future cases.

Some religious communities have criticized the best interests of the child test as permitting the consideration of matters such as religion that would be better shielded from scrutiny. Given the Committee's preference for the best interests test, supplemented by statutory definition as recommended earlier, Members are satisfied that judges and parents are qualified to determine when there is a valid connection between religious practices and the best interests of a child. In most cases, other criteria will be found to be more influential, but a court should be permitted to consider religion when it is a factor.

C. Ethno-Cultural Minorities

The Charter protects the right of Canadians to be free from discrimination on the basis of their ethnic origin. Ethnicity, like religion, should not generally be a factor in decisions about parenting arrangements at separation and divorce. There will no doubt be cases in which parents who do not share the same ethno-cultural origin will have disagreements related to cultural practices. For this reason, the Committee was urged to consider the importance of judges, lawyers, and especially mental health professionals such as custody/access assessors, being free of ethnic or cultural prejudices and being sensitive to the ethno-cultural needs of parents and children.

As the Committee was told by Naïma Bendris, who testified in Montréal,

Matrimonial law reproduces stereotypes and negative prejudices towards immigrant women that stem from the way they are represented in Western societies in general and in Canadian society in particular. These women are seen and judged as different based on their membership in a different group and on the stereotypical images assigned to them which certain court professionals have assimilated, in particular concerning Arab and Muslim women such as me, since I am an Arab and Muslim woman. Immigrant women are assessed in accordance with an analytical grid based on the dominant ideology, which does not reflect their psychological, sociological, cultural and anthropological background. Ignorance of these women's cultural background can result in biases and mistakes in the assessments and can harm these women. In my view, there must be a cultural adjustment to these assessments. (Meeting #16)

Witnesses' concerns in this area would be answered, at least to some degree, by implementation of our recommendation regarding professional accreditation (see Recommendation 31).

D. Canadians Living Abroad

A final group whose interests may differ slightly from those of families living in Canada is Canadian families living outside Canada. Many of these families include at least one member who is employed by the

¹⁰⁶ Young v. Young [1993] 4 S.C.R. 3; D.P. v. C.S. [1993] 4 S.C.R. 141.

Report of the Special Joint Committee on Child Custody and Access

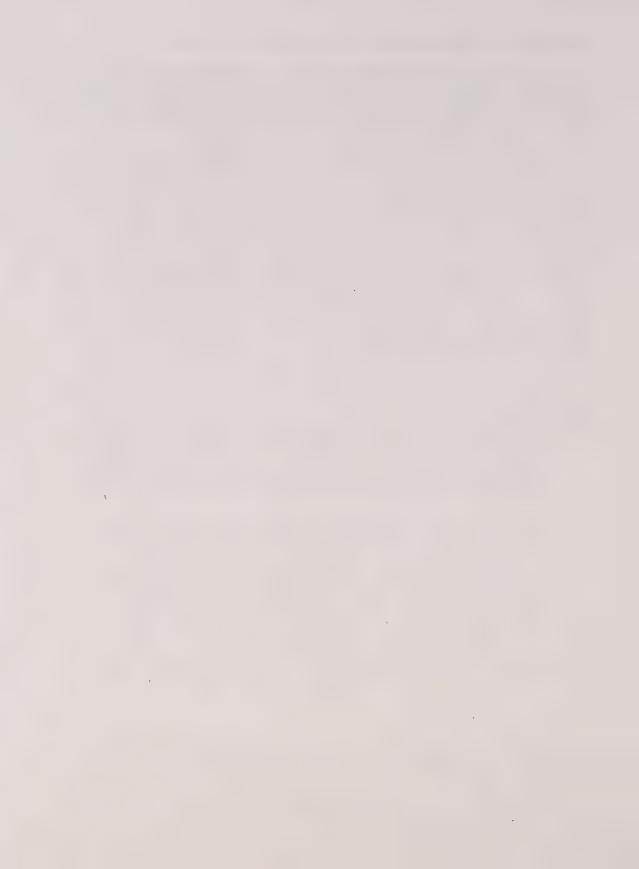
Canadian foreign service or by a foreign employer. Gar Pardy, of Foreign Affairs and International Trade Canada, estimated that about 1.5 million Canadians are living and working abroad. This large group faces complications on marriage breakdown, because they do not have access to the Canadian legal system or its attendant resources. In many cases, part or all of the family will return to Canada upon separation, but some choose to stay and resolve their parenting issues under the local legal regime.

Agnes Casselman, Executive Director of International Social Services Canada, urged the Committee to recommend that Canada sign the 1996 Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. This Convention, which covers a broad range of civil law matters related to parenting arrangements after divorce, would be very helpful in resolving such disputes across international boundaries.

The federal government recognizes the additional stresses on families who move abroad to live and work and, in the case of foreign service officers and their families, encourages them to return to Canada to make arrangements on separation or divorce. For those who remain outside Canada, however, the *Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* might be of assistance. Consultation between governments toward the eventual ratification of that treaty would be necessary in order for Canadians living abroad to benefit from its provisions.

Recommendation

48. This Committee recommends that the Minister of Foreign Affairs work toward the signing and ratification as soon as possible of the 1996 Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.



REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109 of the House of Commons, the Committee requests that the Government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings is tabled (Meeting #55).

Respectfully submitted,

The Hon. Landon Pearson

Landan Rawa

Roger Gallaway

Joint Chairs



DISSENTING OPINION—REFORM PARTY OF CANADA

DECEMBER 1998—"FOR THE SAKE OF THE CHILDREN"

Paul Forseth, M.P.

(New Westminster—Coquitlam—Burnaby)

Eric Lowther, M.P.

(Calgary Centre)

Philip Mayfield, M.P.

(Cariboo—Chilcotin)

The Reform members support the themes of the Report as far as they go, but have profound disappointment that some proposed recommendations were not ultimately supported by the government members, and to varying degrees by the other Parties. The Reform members have been an integral part of the Report process from the beginning, and the Report hopefully will heighten a national concern for the intrinsic value of the family. The Reform members support the concept of "shared parenting" as a right and obligation. There are shortcomings that the Committee failed to address in the final version of the Report, due to the ideological intransigence of some Committee members, regardless of the public testimony.

Reformers recognize the seriousness and extent of the national problem of family breakdown in Canada. The consequences of dissolving families bring injury to children and parents, and hurt the quality of Canadian society. The prevalence of divorce and unstable families is a national problem that has not been sufficiently recognized by the present government. Consequently, a more dynamic political leadership is required at both the federal and provincial level to reduce the social forces that mitigate against stable family life, and secondarily, to improve the set of rules under which families may dissolve. Moreover, the needs of children require a bold approach in family-law reform.

We recognize that the existence of the Committee was not initiated by the government, but was only created as a compromise in exchange for Senate passage of amendments to the law governing child maintenance payments. It is recognized that under the federal *Divorce Act*, parents themselves may divorce, but they do not divorce their children. Also, the balance of parental rights and obligations has not been sufficiently defined in the current *Divorce Act*. Consequently, in view of the serious political vacuum surrounding the national family-law problem, the Committee Report recommends a change to the historical nature of divorce law.

It is recognized that parental rights and obligations continue after family dissolution. However, it is clear that in too many cases, the legal system poorly serves the interests of children. In view of the outcry in Canada of many sad stories, a new approach that legally emphasizes children's needs over short-term parental wants, has been recommended. Studies and social convention point to the ideal, that children thrive best in a conventional stable two-parent family where there is a loving father and mother. If families dissolve, then a legal climate that facilitates the ongoing involvement of children with both parents in a full and meaningful way, should be the preferred outcome of parenting plans.

Specifically, in addition to the Committee recommendations, the Reform members recommend that:

- The individuals to whom the *Divorce Act* applies should be more clearly defined concerning who is considered "a child of the marriage". The *Act* concerning the parenting plans and maintenance payments should be applied only for "children" and not "young adults". Therefore the definition of "child" in the opening definition section of the *Act* should be amended to read in part... "is the age of majority or over and under their charge but unable, by reason of illness, disability, to withdraw from their charge. The existing additional terms "or other cause" and "or to obtain the necessaries of life" should be deleted from the definition, as the courts have unreasonably read-in obligations from these terms that have created a fundamental inequality between "intact families" and "divorced families".
- Grandparents of both blood and adoption not be required to seek "leave of the court". The second profound shortcoming of the Committee Report is the failure to recommend a change to Section 16(3) of the Divorce Act, which says "A person, other than a spouse, may not make an application under subsection (1)or(2) without leave of the court". The recommendation recognizes the special relationship and obligation that grandparents may have in the legal parenting plans for children of divorce. Grandparents should not have to first seek permission of the Court, if they choose to file their own Court action for the making of parenting plans. Interestingly, the new Nisga'a settlement in B.C. says its government does not need "leave" under this section.
- The Report forcefully comments upon the obvious historical failure of the federal government to contemplate in family law the pervasive and insidious problem of "false accusations of criminal conduct", the "unreliability of sworn affidavits" that lawyers have deposed from their clients, and the

pathetic record of the Courts to defend the Orders they make about child-care arrangements and parent-child contact. The Reform Committee members wanted clear recommendations for action on these points but were unable to persuade the Committee. The Committee would not approve recommendations for improvements to the *Criminal Code* concerning deliberate false accusations of abuse or neglect, and the need for "prosecutors" to more frequently act to enforce *Criminal Code* sections 131 & 132-misleading justice, 135-contradictory evidence, 137-fabricating evidence, 138-affidavits, 139-obstructing justice, in family law matters.

- The ethical standards of law societies and bar associations concerning the swearing and filing of affidavits be improved, and codes of conduct be actionable in law.
- Provincial governments review their definitions of "child at risk" in their respective "child-protection legislation", where there are repeated unsubstantiated allegations of abuse.
- The provisions of the "Child Support Guidelines" operate under the principle of reasonableness. Reform Members wanted a clear statement recognizing how the new rules of the "Child Support Guidelines" may operate against the best interests of children. Specifically, the Committee merely recommended that the Minister of Justice undertake as early as possible a comprehensive review. Reform members of the Committee argued for stronger language in this section including the principle of "ability to pay versus demonstrated need".
- Enforcement of parent-child contact terms, as rigorously as child maintenance. Although financial transactions and parent-child contact are not legally tied together, the persistent psychological connection and sometimes real social connection must be recognized. Capricious non-compliance of ordered parent-child contact could be considered a form of child abuse, and treated accordingly during enforcement proceedings. Parents that disturb children through a failure to fulfil their duties under a court order should be penalized.

The long-standing record of inaction to the pervasive complaints on the preceding points from across the country, partially explains the deep malaise in Canadian family law practice. These serious problems on the operational side of the law, require remedy through government leadership with the provinces, the law societies, and the court system. The Committee Report does not go far enough in signalling these problems or suggesting remedies. It clearly is an area for further study.

As the pressures that mitigate against the stability of families are often economic, the Reform members also note the systemic discrimination of the income tax law between "intact families" and "dissolved families". Reform members promote the development of a family or household orientated comprehensive social security system administered through the income-tax system. Additionally, it should have been noted that the rules for delivery of the "child tax benefit" are in some disarray, and in many cases are delivered contrary to *Divorce Act* court orders.

Recourse to a Court is often the final phase of the disintegration process when alternatives have failed. Unfortunately, the Court is a rather blunt instrument to respond to the unique and changing needs of children caught in a parental conflict. Sadly, some parents are able to unreasonably manipulate the justice system during a divorce proceeding, and thereby communities in general suffer.

Therefore, it must be emphasized that the witness testimony that the Committee heard, highlighted the need for a societal focus on better parenting, family life education, and for much greater alternative dispute settlement services outside of courts. There is great need for a spectrum of preventive and remedial social services, and a renewed commitment from the workers in the system, to speak out for renewal and for quick change from what is currently delivered. When family trouble strikes, governments have a role to provide accessible and affordable help to children and parents.



DISSENTING OPINION OF THE BLOC QUÉBÉCOIS ON THE REPORT OF THE SPECIAL JOINT COMMITTEE

ON CHILD CUSTODY AND ACCESS

The study conducted by the Joint Committee deals with problems that are very timely and constantly changing. The growing numbers of divorces and of children born outside marriage have created new and complex dynamics in the lives of families and, by definition, children. In our view, the Committee was not the appropriate forum for finding legislative solutions to the social problems that affect an ever-growing number of our fellow citizens. However, the Committee's sittings, particularly when the draft report was written, did help to spotlight a paradoxical situation: the manner in which provincial and federal jurisdictions in this field are divided up, which cannot be justified today.

The situation is that all matters relating to the family, education and social services are clearly within the jurisdiction of the provinces, as are any questions relating to separation from bed and board. In Quebec, separation from bed and board is covered by articles 493 *et seq.* of the Civil Code of Québec. On the other hand, divorce is under federal jurisdiction, by virtue of the Constitution. The vast majority of divorces are settled out of court. In most cases, agreements regarding child custody and access are made when a couple separates. Since separation from bed and board is under provincial jurisdiction, it would be logical for legislation on divorce to be as well.

Accordingly, we recommend that the *Divorce Act* be repealed and that jurisdiction over divorce be transferred to the provinces.

It would also be logical to repeal the *Marriage Act* and transfer that jurisdiction to the provinces. The celebration of marriage, as well as division of property, the civil effects of marriage and filiation are within the exclusive jurisdiction of the provinces, while the substantive requirements (capacity to contract marriage and impediments to marriage) are under federal jurisdiction. In Quebec, for example, the Government of Quebec has legislated to permit civil marriages. In our view, this is another example of the pointless and outdated division of powers. It would be much simpler for all family law to be under the jurisdiction of a single level of government: the provinces. On this point, we would quote the Honourable Senator Gérald-A. Beaudoin, who wrote, in 1990:

[TRANSLATION] "One might ask why, in 1867, the framers gave Parliament exclusive jurisdiction over marriage and divorce. This seems to have been for religious reasons. Under article 185 of the Civil Code of Lower Canada, marriage could be dissolved only by the natural death of one of the spouses. This principle was accepted by the vast majority of Quebecers, who were Catholics; the Protestants, on the other hand, wanted the Parliament of Canada to be able to legislate on divorce. Accordingly, subsection 91(26) of the Constitution Act, 1867, was enacted to give exclusive jurisdiction over marriage and divorce to the federal Parliament." (Beaudoin, Gérald-A., La constitution du Canada, Institutions, partages des pouvoirs, Droits et libertés, Montreal, 1990, éditions Wilson et Lafleur 1990, p. 360)

What was appropriate in 1867 no longer is today. Given that the religious issue no longer has the same significance, our laws ought to reflect reality. Our recommendation would mean that the provinces could have complete jurisdiction over their family law and could legislate in that field as appropriate to their own social context.

We would again quote the Honourable Senator Beaudoin:

[TRANSLATION] "The question then arises of whether the field of marriage and divorce should not be returned to the provinces, thereby enabling Quebec to have more absolute control over its family law, an important part of its private law, which is different from the private law of the other provinces.

Some authors believe that it would be best to leave this area of jurisdiction in section 91. They consider it paradoxical to want to decentralize this field, while the United States seems to want to move toward centralization and uniformity in divorce laws. Perhaps they are forgetting that we have two systems of law in Canada, and that the arguments they make in support of their position lose some of their force in a heterogeneous federation such as Canada." (Ibid., p. 366)

It was apparent from the Committee's inception that jurisdictional problems would dog its every step. The Committee's mandate was as follows:

"That a Special Joint Committee of the Senate and House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests."

We participated in this Committee because the subject is a very serious and important one in our society, particularly for people who have experienced difficulties in the process of a divorce or separation from bed and board. However, it is not up to the federal government to legislate in this field; that is a matter for the provinces. We need only compare the manner in which the provinces deal with family policy to understand that there are significant differences. For instance, in Quebec, our civil law system means that our vision of family law is different from the rest of Canada's: we would cite the long debate that took place in the Committee regarding the concept of the best interests of the child, which has been part of the Civil Code of Québec for a number of years now.

Parents and children would be much better served if family law were entirely under provincial responsibility.

Notwithstanding our position, we nonetheless consider it important to point out a number of facts:

- 1. Given that the large majority of custody and access cases are settled by mutual agreement, we would express serious reservations regarding the need to legislate controls on all cases.
- 2. The fundamental rights of all individuals must be protected, and specifically their right to privacy.
- 3. We recognize the principle of the best interests of the child. This means that a child must not be the victim of conflicts between his or her parents, and the child's interests must not be confused with those of the child's parents or extended family.
- 4. Family violence exists, and the danger to victims of family violence is exacerbated in a separation. The safety of children and their parents must therefore be protected. The large majority of studies and statistics show that women are most often the victims of family violence. In view of how hard it is to bring situations of violence out into the open, we would question the need to refer to "proven" violence (see recommendation 16.11).
- 5. The responsibility for resolving disputed cases lies with the courts.
- 6. The vast majority of parents sincerely want what is best for their children: they are not highway robbers. We do not consider the use of sanctions and coercion, and making parental obligations excessively rigid, to be helpful approaches in a process which, even under the best circumstances, is always a difficult one.

- 7. Although a number of witnesses talked about cases in which there had been false accusations of abuse, it must be recalled that the *Criminal Code* already contains provisions against perjury. Before legislating in this respect, it is essential that research be done to shed light on these situations.
- 8. Although the Committee should have emphasized parental responsibilities, it must be acknowledged that instead it was transformed into a battle of the sexes. It is regrettable both that the positions of fathers and mothers became so polarized and that some people chose to question the ground women have struggled long and hard to gain.

To summarize, the position of the BQ on the recommendations in the report is as follows:

We are opposed to the following recommendations: 10, 19, 22, 23, 25, 26, 30, 43.

We are in favour of the following recommendations: 1, 2, 15, 17, 37, 41, 42, 45, 47, 48.

We are in partial disagreement with the following recommendations: 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 20, 21, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 44.

ACKNOWLEDGEMENTS

We would like to thank all of the Committee's staff for their excellent work, and especially the two research advisers, Kristen Douglas and Ron Stewart, and the clerks, Catherine Piccinin and Richard Rumas. We would also like to thank all of the individuals and groups who took the time to present their views to us. Lastly, we would like to express our special thanks to Landon Pearson for her patience and her efforts in the cause of children's welfare.

Madeleine Dalphond-Guiral, M.P. Laval-Centre

Caroline St-Hilaire, M.P. Longueuil

CHILD CUSTODY AND ACCESS: FOR THE SAKE OF THE CHILDREN DISSENTING OPINION—NEW DEMOCRATIC PARTY

Submitted by Peter Mancini, M.P.—Sydney-Victoria

The response by Canadians to the Special Joint Committee study on Child Custody and Access has been overwhelming. The NDP is grateful to the many individuals and organizations who took the time and effort to make their views known. Together, the input, advice and feedback constitute an important body of research for pursuing changes to current legislation dealing with issues of child custody and access. Underlying it, is a clear sense of responsibility to ensure that the best interest of children is paramount.

The NDP is committed to an approach that ensures the best interests of children are made the determining factor in all decisions related to custody and access.

Canadians want a fair and equitable process for dealing with the very painful and difficult issues of child custody and access in divorce. They want their government to play a pro-active role to ensure the best interests and safety of children and parents are met by the system.

The primary focus of the committee has been to develop an appropriate framework to ensure that the best interests of the child are served by the system. Time and time again, Canadians expressed concerns about the current system and its failure to meet the needs of parents and children. The Committee has addressed many difficult issues and the report reflects a great deal of progress and many recommendations that the NDP supports.

There are however, a number of issues that the NDP feels were not adequately addressed by the committee:

Process

There were a number of problems related to the process the committee employed in gathering evidence and hearing witnesses.

The NDP felt that in order for the committee to fully address the serious issues before it, it was imperative for all interested Canadians to have equal access to the committee to have their views heard. In order to achieve that goal we believed that it was essential for the committee to travel beyond urban centres to address the specific concerns of rural communities. We recognized the difference in the nature and quality of services available to Canadians living in rural communities compared to those in urban centres.

While the committee recognized the need to reach out to rural communities, funding was not provided by Parliament for the necessary travel. Consequently a rural perspective is lacking from the report.

Other concerns related to the process include:

- A lack of public notice given to enable all interested parties to appear before the committee
- A perceived bias of some committee members
- The poor treatment and lack of respect shown witnesses by some committee members

These concerns cast a shadow on the quality of the end product of the committee and on the excellent work of the dedicated staff of the committee. The clerks of the committee, researchers and staff worked tirelessly demonstrating the highest degree of professionalism providing invaluable service and support, without which our report would not have been possible.

Poverty

The issue of child poverty is not dealt with in the report despite the fact that child poverty is a serious problem facing Canadian families. Child poverty in Canada has increased by 60% since 1989 and 26,000 more children are living in poverty today in Canada than at this time last year.

No real discussion of a child-centred approach can take place without this issue being addressed.

The NDP recommends:

- That as poverty is a contributing factor to family break-up and domestic violence it must be addressed by all level of governments.
- That the federal government live up to its commitment to end child poverty.
- The federal government address the fact that as long as parents who have custody of children are
 forced into poverty, then society will accept that the divorce process will punish children of
 divorce, particularly those from low-income families.

Domestic Violence

The report recognizes that domestic violence is not compatible with the best interest of the child and that where there is a history of violence, joint access and custody may not be beneficial or in the best interest of the child. Parents should not be required to attend mediation in such circumstances. The report clearly identifies that a history of violence be taken into account as a determining factor in assessing the best interest of the child.

Many groups and individuals that appeared before the committee expressed serious concerns about the impact of domestic violence, particularly towards women, on children.

Women are the main victims of domestic violence and face serious safety concerns when leaving an abusive relationship. Moreover, children who witness domestic violence are negatively affected by it.

The NDP recommends:

- The federal government take a leadership role in ending domestic violence against women and children.
- That the safety of parents and children should be considered a priority when determining custody and access, supervised exchanges and visitations.
- That legislation allow a court to require perpetrators of domestic violence to undertake counselling or treatment as a condition of custody or access.

The test when determining proof of violence should be that of the Civil Test based on the "balance of probabilities" and not the criminal test "beyond a reasonable doubt".

Access to Information

The committee has placed a reverse onus on professionals requiring them to release information about the child to either parent unless otherwise ordered. We reject the argument that a greater burden be placed on teachers, doctors and other professionals to determine whether or not they should release information to parents, especially in high-conflict divorces.

The NDP recommends:

That any parenting plan put forward be required to state that each parent is entitled to pertinent information about the child including medical and school record, etc. There should be a presumption by the court that any such information be shared and that reasons be provided if this is

not the case. When the presumption is not followed then the agreement or order should clearly set out exactly what information is available to each parent. These orders can then guide those responsible for releasing records.

Enforcement of Custody and Access Orders

The non-compliance of court orders and the inability or unwillingness of the court to act was a major source of frustration and anger for many who appeared before the committee or submitted briefs. The issue sparked heartbreaking testimony from parents, many of whom had been separated from their children for years, highlighting problems with the legal system in dealing with access enforcement.

Many also argued that parents who have custody and are charged with ensuring the best interests of the child are placed in a difficult position when following an access order that may not be in the best interest of the child.

The major sources of frustration for parents in access disputes centre on the legal system. The lack of legal counsel, delays in obtaining appearance dates for enforcement hearings and the cost of court appearances to enforce access orders, all contribute to the overwhelming frustration and feelings of powerlessness felt by parents dealing with the system.

Often parents wait for months for a hearing, paying the price of being denied access until a court order is issued, in effect penalizing parents who seek to avoid conflict by involving the court.

The need for enhanced legal aid programs is critical. The availability of affordable legal counsel and a speedy court process is essential.

The NDP recommends:

- That the importance of meaningful access to legal aid be acknowledged and that federal and provincial funding be provided to increase the availability of civil legal aid.
- That resources be put in place to ensure the speedy resolution of access denial.

APPENDIX I

List of Witnesses

Associations and Individuals	Date
Department of Justice	Wednesday, February 11, 1998
Marilyn Bongard, Counsel, Family, Children and You Section	
Thea Herman, Senior Assistant Deputy Minister, Poli	icy
George Thomson, Deputy Minister of Justice and Dep Attorney General	puty
Department of Justice	Monday, February 16, 1998
Marilyn Bongard, Counsel, Family, Children and You Section	ath
Carolina Gilberti, Acting Team Leader, Child Suppor Team	t
Thea Herman, Senior Assistant Deputy Minister, Poli	icy
Jim Sturrock, Research Officer, Policy Sector	
Barreau du Québec	Wednesday, February 18, 1998
Roger Garneau, Member of the Committee	
Dominique Goubau, Professor, Laval University, Factorial of Law and Member of the Committee	ulty
Miriam Grassby, President of the Committee of the B Family Law	ar on
Suzanne Vadboncoeur, Director of Research and Legislation and Secretary of the Committee on Factorian	amily
Queen's University	Wednesday, February 25, 1998
Nicholas Bala, Professor, Faculty of Law	
Fathers Are Capable Too (FACT)	Wednesday, March 11, 1998
Malcolm Mansfield, President	
Deborah Powell, Media Spokesperson	
National Shared Parenting Association	
Danny Guspie, Executive Director	
Heidi Nabert, Director	
National Action Committee on the Status of Women	Monday, March 16, 1998
Cori Kalinowski, Member, Justice Committee	
National Association of Women and the Law	
Carole Curtis, Member of Family Law Working Grou Member of Law Society Judy Poulin, Member of SCOPE	p,

Date

National Council of Women of Canada

Ruth Brown, Past President

Helen Saravanamutoo, Vice-President

YWCA of Canada

Sally Bryant Ballingall, Past President

Elaine Teofilovici, Chief Executive Officer

Association to Reunite Grandparents and Families

Irma Luyken, President

Canadian Grandparents' Rights Association, Ottawa

Madelaine Bremner, President

Patricia Moreau, Member

Grandparents Requesting Access & Dignity (GRAND),

Ottawa

Liliane George, President

Jeanette Mather, Honorary Member

Égale

John Fisher, Executive Director

As an Individual

Philip MacAdam

Nelligan, Power

Pam MacEachern, Barrister and Solicitor

Pauline Jewitt Institute of Women's Studies

Katherine Arnup, Director and Associate Professor, School of Canadian Studies

Sack Goldblatt

Cynthia Peterson

As Individuals

Barbara Landau

Bernice Shaposnick

Philip Shaposnick

Queen's University

Martha Bailey, Professor, Faculty of Law

University of Toronto

Howard Irving, Professor, Faculty of Social Work

Wednesday, March 18, 1998

Monday, March 23, 1998

Wednesday, March 25, 1998

Date

Bastedo, Stewart and Smith

Monday, March 30, 1998

Bryan Smith

Canadian Association of Retired Persons

Judy Cutler, Association Director of Public Relations Carol Libman, Director of Public Relations

Clark Institute of Psychiatry

Eric Hood, Coordinator, Co-op Education

DADS Canada

Pauline Green, Counsel

Stacy Robb, President

Easton Alliance for the Prevention of Family Violence

Stephen Easton, Managing Director

Hugh Graham, Director, Electronic Communications

Fairness in Family Law

Yvonne Choquette

James Hodgins, Executive Director

Grandparents Raising Grandchildren and Grandparents Requesting Access and Dignity (GRAND)

Joan Brooks, Founder

Guvatt & Gaasenbeek

Richard Gaasenbeek

Helping Unite Grandparents and Grandchildren

Linda Casey, Founder

Hincks Centre for Children's Mental Health

Elsa Broder

Human Equality Action & Resource Team

Butch Windsor, President

As Individuals

Sharman Bondy

Eugene Colosimo

Darlene Ceci-Laws

Michael Day

Reisa Eisen

Bruce Haines

Kevin Laws

Date

Howard Waiser

Simon Wauchop

Justice for Children

Dale Kerton

Mississauga Children's Rights

Grant Wilson, President

Office of Child and Family Advocacy, Ontario

Judy Finlay, Chief Advocate

Leslie Hinkson, Advocacy Officer

Office of the Children's Lawyer, Ontario

Willson A. McTavish, Children's Lawyer

Dena Moyal, Legal Director, Personal Rights Department

Lorraine Martin, Clinical Coordinator of Social Workers

Ontario Legal Aid Plan

Robert Holden, Provincial Director

Keith Wilkins, Client Services Co-ordinator

W. Glen Howe & Associates

John Burns

Glen Howe

Assaulted Women's Helpline

Beth Bennet, Program Director

Leslie Sheridan-Silver

Balance Beam

Tony Vorsteveld, Facilitator

Coalition of Canadian Men's Organizations

J. Kirby Inwood

Equal Parents of Canada

Eric D. Tarkington

Families Against Deadbeats

Renate Diorio, Founder

Ilene McGillis, Member

Fathers for Justice

Rick Morrison, President

Girl Guides of Canada

Elaine Paterson, Chief Commissioner

Tuesday, March 31, 1998

Date

Margaret Treloar, President Elect

As Individuals

Michael Cochrane

Wendy Dennis

Patrick Ellis

Walter Fox

Stan E. Gal

Frank Heutehaus

Greg Kershaw

Saro Kumar-McKenna

Sheila Kumar-McKenna

Trevor Lynch

Cynthia Marchildon

Marty McKay

Peter Meier

Deborah L. Merklinger

Phil Pocock

John Vander Kooii

In Search of Justice

Ross Virgin, President

Kids Need Both Parents

Wayne Allen, Director

Ontario Association of Interval and Transition Houses

Ruth Hislop, Vice-President

Eileen Morrow, Lobby Co-ordinator

Ontario Association of Social Workers

Barbara A. Chisholm, Child and Family Consultant

Gillian McCloskey, Associate Executive Director

Second Spouses of Canada

Dori Gospodaric, Co-President

Stepfamilies of Canada

Nardina Grande, President

Canadians for Organizational and Personal Accountability

Dorian Baxter

Central Toronto Youth Services Research and Program

Fred Matthews, Psychologist and Director

Wednesday, April 1, 1998

Children's Voice

G. (Bill) Flores

Community Coalition for Custody and Access

Rita Benson, Member

Keith Marlowe, Member

Sylvia Pivko, Executive Director, Family Court Clinic

Family Conflict Resolution Services

Vernon Beck, Program Director

As Individuals

Usha Ahlawat

Amy Beck

Anne Ross Demeter

Barry Demeter

Jane King

Tracy London

Alexandra Raphael

London Coordinating Committee to End Woman Abuse

Margaret Buist, Lawyer, Family Law

Bina Ostoff, Counsellor Advocate, London Battered Women Advisory Centre

Jan Richardson, Executive Director, Women's Community House

London Custody and Access Project

Marlies Suderman

Non-Custodial Parents of Durham

Ted Eye

Ted Greenfield

REAL Women

Gwendolyn Landolt, National Vice-President

Lorraine McNamara, National Secretary

Association lien pères enfants de Québec

Gilbert Claes

Laurent Prévost

Rock Turcotte

Fédération des associations de familles monoparentales et recomposées du Québec

Sylvie Levesque, Director General

Thursday, April 2, 1998

Date

Claudette Maingué, Development Agent

Grandparents Requesting Access and Dignity (GRAND), Montreal

Mathilde Erlich-Goldberg, President

Michel Girard, Lawyer

Albert Goldberg, Vice-President

Groupes d'action des pères pour le maintien des liens familiaux

Norman Levasseur, President

As Individuals

Jacques Boucher

Annie Brazeau

Pierre Chapdelaine

Joel Duchoeny

François Gadoury

Besime Kalaba

Ian Solloway

Nicholas Spencer-Lewin

Robert Spicer

Joy Sporin

Pères séparés inc.

Sylvain Camus

Regroupement des familles monoparentales et recomposées de Laval

Agathe Maheu

F.E.D.-U.P.

Friday, April 3, 1998

Harry Braunschweiller, Member

Tony Drufovka, Member

William Levy, President

Goldwater, Dubé

Anne France Goldwater, Barrister, Family Law

Groupe d'entraide aux pères et de soutien à l'enfant

Claude Lachaine, Director

Ghislain Prud'homme, Director

As Individuals

Naïma Bendris

Jacques Gurvits

Date

Cerise Morris

Janice Outcalt

McGill University, Department of Education Counselling

Glenn Cartwright, Professor

Despina Vassilion

Montreal Men Against Sexism

Martin Dufresne

Nemesis Network

Elizabeth Cook

Ordre professionnel des travailleurs sociaux du Québec

Claudette Guilmaine, Social Worker, Family Mediator

Organization for the Protection of Children's Rights

Riccardo Di Done, Founding President

Angela Ficca, Lawyer

Parental Alienation Information Network

Pamela Stuart-Mills

University of Quebec at Hull, Department of Social Work

Denyse Côté

Families in Transition

Ester Birenzweig

Rhonda Freeman, Director

As an Individual

Ruth Pickering

Canadian Psychological Association

John Service, Psychologist, Executive Director

As an Individual

Barbara Jo Fidler

London Family Court Clinic

Gary Austin

Royal Ottawa Hospital

Paul Carrier, Social Worker

Act II Safe Choice Program

Connie Chapman, Program Coordinator

Monday, April 20, 1998

Wednesday, April 22, 1998

Monday, April 27, 1998

Date

B.C. Men's Resource Centre

William Taylor Hnidan, Director

B.C. Yukon Society of Transition Houses

Helen Dempster, Coordinator of Children's Services

Canadian Grandparents Rights Association

Nancy Woolridge

Children's Advocate, British Columbia

Joyce Preston, Child Advocate

Dick Freeman Society

Ken Wiebe

Family Service of Greater Vancouver

Jasmine Lothien

Father's Rights Action Group

Joseph Maiello, Representative

Grandparents Raising Grandchildren of B.C.

Marilyn Stevens, President and Founder

As Individuals

Erik Austin

Debbie Beach

Tana Dineen

Ian Gillespie

Christopher Gratton-Mathiesen

Daphne Jennings

Doug Reid

Guy Thisdelle

Men Supporting Men

Tony McIntyre

State of Washington, U.S.A

John Dunne, Psychiatrist

Diane Lye, Researcher, Washington Supreme Court

Eugene Oliver, Oliver and Associates

Vancouver Coordinating Committee

Laraine Stuart

Ruth Lea Taylor

Date

Vancouver Men

Carey Linde

Victoria Men's Centre

Moray Benoît, Director

Harvey Maser, President

West Coast L.E.A.F.

Shelley Chrest, Member, Chair, Law and Government Committee

Women in Action

Angie Lee, Member

Colleen Varco, Member

YWCA Munroe House

Kelley Chelsey, Transition House Worker

Alberta Federation of Women United for Families

Hermina Dykxhoorn, Executive Director

Calgary Adhoc Committee on Children's Rights

Dale Hensley, Lawyer

Calgary Status of Women Action Committee

Laurie Anderson, Board Member

Julie Black, Coordinator

Canadian Grandparents Rights Association, Alberta Branch

Florence Knight, President

Canadian Research Institute for Law and Family

Joe Hornick, Executive Director

Janet Walker, Professor, Director

Child Find Alberta

Max Blitt, Past President

Alex Weir, District Manager

Children's Advocate, Alberta

Mike Day, Child Advocate

Sherry Wheeler, Child Advocate

Divorced Parents Resources

Sean Cummings

Wednesday, April 29, 1998

Edmonton and Northern Custody and Mediation Program

Kent Taylor, Mediator, Coordinator

Equitable Child Maintenance and Access Society, Calgary Chapter

Michael A. LaBerge, President

Marina L. Forbister, Past President

Equitable Child Maintenance and Access Society, Edmonton Chapter

Brian St. Germaine, Vice-President

Carolyn Van Ee, President

Family of Men

Earl Silverman

Fathers for Fair Treatment

David Merrell, Director

Government of Alberta

John Booth, Counsel, Family Law

As Individuals

Babatunde Agbi

Herbert Allard

Roy Buksa

Byrnece G. Cortens

Kim Cummins

Tony Hall

Gwen Hunter

Rob Huston

Stephen Jones

Gary J. Kneier

Kathy Thunderchild

Joern H.R. Witte

Men's Education Network

Jay Charland, Spokesperson

Men's Educational Support Association

Paul Miller, Member

Gus Sleiman, President

Orphaned Grandparents Association

Annette Bruce, President

Date

Children's Advocate, Saskatchewan

Thursday, April 30, 1998

John Brand

Deborah Parker Loewen

As Individuals

Larry Birkbeck

George Charpentier

Yvonne Choquette

Jack Christopher

Kelly Grymaloski

Douglas R. Johnston

Betty Junior

Randy Liberet

Gordon Mertler

Wayne Morsky

George Seitz

Larry Shaak

Eldon Szeles

Murray Valiaho

Merchant Law Group

Tony Merchant, Q.C.

Evatt Merchant

National Shared Parenting Association

Leonard D. Andychuk

Provincial Association of Transition Houses of

Saskatchewan

Virginia M. Fisher, Coordinator

Saskatchewan Action Committee on the Status of Women

Lynnane Beck

Jeannette Gilskuskie

Kripa Sekhar, Executive Coordinator

Saskatchewan Association of Social Workers

Sheila Brandick

Tom Galluson

Saskatchewan Battered Women's Advocacy Network

Julie Johnson

Date

GRAND Society, Manitoba Chapter

Friday, May 1, 1998

Eileen Britton, President

As Individuals

Kris Anderson

Richard A. Boer

Brent R. Burns

Micheal Catling

Duncan Croll

Rowena Fisher

Dave Goldhawk

Kathleen Harvey

David Hems

Ginette Lemoine

Ross Mackay

Dennis McKenzie

Thomas Plesh

Ellana Ronald

Keith Scott

Reena Sommer

Murray Steele

Wayne Unger

Brian Vroomen

Manitoba Association of Women's Shelters

Waultraud Grieger, Executive Director

Men's Equalization Inc.

Roger Woloshyn, President

New Vocal Man Inc.

Joyce Owens, Secretary

Parents Helping Parents

Louise Malenfant

Psychology Associates

Rosalind Golfman, Clinical Psychologist

University of Manitoba and Family Violence Court

Jane Ursel, Department of Psychology

Date

Wilder, Wilder and Langtry

Susan Baragar

Canadian Bar Association

Monday, May 4, 1998

John D.V. Hoyles, Executive Director

Heather McKay, Chair, Family Law Section

Ruth Mesbur

Eugene Raponi, Treasurer, Family Law Section

Canadian Association of Chiefs of Police

Wednesday, May 6, 1998

Vincent Westwick, Member of the Law Amendments Committee and Legal Advisor

Children's Aid Society of Ottawa-Carleton

Shauna Lloyd

Heidi Polowin

Michael Pranschke

Department of Foreign Affairs and International Trade

Gar Pardy, Consular Operations

International Social Services

Agnes Casselman, Executive Director

Ontario Ministry of the Attorney General

Sally Bleecker, Coordinator, Ottawa Supervised Access Program

Joan Gullen, Coordinator, Ottawa Supervised Access Program

Judy Newman, Coordinator, Supervised Access Program

Lise Parent, Volunteer

RCMP Missing Children's Registry

Sgt. John Oliver

Canadian Coalition for the Rights of the Child

Monday, May 11, 1998

Tara Collins

Fernande Meilleur, Chair

Child Welfare League of Canada

Mel Gill, Board Member

As an Individual

Jeffery Wilson

Family Mediation Canada

Michael Guravich, President

Wednesday, May 13, 1998

Date

Orysia Kostiuk

Family Services Canada

Maggie Fietz, Executive Director

Kathleen Stephenson, Researcher

As Individuals

Jeanne Byron

Diana Carr

Margaret Decorte

University of Michigan

Thomas B. Darnton, Professor, Child Advocacy Law Clinic, Law School

Washtenaw County, Michigan

John Kirkendall, Judge

Aboriginal Head-Start (Pre-School)

Murline Browning, Executive Director

Adhoc Committee on Custody and Access

Susan Boyd

Battered Women's Support Services

Fatima Jaffer, Information Coordinator

Veenu Saini, Coordinator, Legal Advocacy Program

Family Forum

John Barson, Executive Director

Fathers for Equality

David A. Campbell

As Individuals

Marie Abdelmalik

Lori Campbell

Christopher Cole

Robert Alan Cottingham

Nicole Deagan

Colleen G. Murphy

Peter J. Ostrowski

Jeffrey Patterson

Laurie Payne

Georgina Taylor

Charles Traynor

Tuesday, May 19, 1998

Jennifer Wade

Kamloops Women's Resource Centre

Sheila Smith, Coordinator

Mom's House Dad's House

Katherine McNeil, Child Custody Consultant

Moir Associates

Donald Moir, Barrister, Family Law

Parents of Broken Families

Brian Grieg, Vice-President

Dave Hodgson, President

Simon Fraser University

Barry Beyerstein, Psychologist

University of British Columbia

Donald Dutton, Professor of Psychology

Edward Kruk, Professor of Social Work

Vancouver Custody and Access Support and Advocacy

Association

Ajax Quinby

Yew Transition House

Sheryl Burns, Women's Counsellor

YWCA Children Who Witness Abuse Program

Mark Stevens, Coodinator

Canadian Male Survivors of Child Abuse Resource Centre

Wednesday, May 20, 1998

Guy L'heureux, Founder

Children's and Parents Equality Society

George Moss, Founder

As Individuals

Christopher Brooks

Elsie Cable

Russell Cable

Ferrel Christensen

Ron Evans

James Haiden

Brian Hindmarch

Lynne Jenkinson

Date

Abdulahi Mahamad

Alex Mahé

Dan Mason

Maureen Morrison

Denis Paquette

Terence Rowley

Matt Taylor

Mediation and Family Court Services

Mary Jane Klein, Mediator

Men's Equal Access Society

Michael McGill, Member

Métis Regional Council-Zone 4 of the Métis Nation of Alberta

Brian Fayant, President

Milner Fenerty

Gerald Chipeur, Lawyer

As Individuals

Donna Andrews

Robert McKim

Dave Omah-Maharajh

Eve Roberts

Lewis Day Barristers, Solicitors, Notaries

David Day, Q.C.

Provincial Advisory Council on the Status of Women

Joyce Aylworth, Member

Joyce Hancock, President

Provincial Association Against Family Violence

Helen Murphy, Coordinator

Kirsten Schmidt, Member

Elaine Wychreschuk, Member

Unified Family Court of St. John's

Cathy Foster, Court Counsellor

Emily Friel, Court Administrator

Sandra Hefford, Court Counsellor

Nancy Paul, Court Counsellor

Monday, May 25, 1998

Date

Berkley Reynold, Previous Court Administrator, Child Support Guidelines

White Ottenheimer

Gillian Butler, Lawyer, Mediator

Williams Roebothan

Glenda Best

Annapolis Valley-Hants Community Action Program for Children

Tuesday, May 26, 1998

Pauline Raven, Regional Coordinator

Deborah Reimer, Advocacy and Support Worker

Chrysalis House Association

Mary De Wolf, RSW

Ginger McPhee

Dalhousie Legal Aid Services

Donna Franey, Director

Elaine Gibson, Faculty Lawyer

Claire McNeil, Staff Lawyer

Dalhousie University

R. Thompson, Professor, Faculty of Law

Family Rights Association of Nova Scotia

Elizabeth Bennett, Family Rights Volunteer

William O'Neil, Executive Director

As Individuals

Darcy Gray

Gene Keyes

Carlo Martini

Keith Mattinson

Sharon Molloy

Steven Nelson

Paul Parks

Brian Parsons

Alan Vokey

Islamic Society of North America

Jamal Badawi, Member of the Shura Council

Mainland South Committee Against Women Abuse

Marilynne Bell

Date

Glenda Haydon, Member

Nova Scotia Advisory Council on the Status of Women

Patricia Doyle-Bedwell, Chair

Nova Scotia Shared Parenting Association

Rick Johnson, Director

Parents Without Custody

Nancy Chipman, Founder

Reierson Sealey, Barristers and Solicitors

Julia Cornish, Lawyer, Family Law

Angus Schurman, Lawyer, Family Law

Transition House Association

Lyn Barrett, Executive Director of Cumberland County Transition House Association

University College of Cape Breton Children's Rights Centre

Katherine Covell, Director and Associate Professor of Psychology

Women's Centres CONNECT

Bernadette MacDonald

Georgia MacNeil

Community Legal Information Association of Prince Edward Island

Ann Sherman, Executive Director

As Individuals

Bob Albert

Kathleen Loo Craig

David Dodds

Brian MacKay

Justin C. MacLellan

Kathleen MacLellan

Janet MacLeod

Lillian Mead

Sara Underwood

Macnutt and Dumont

Daphne Dumont

Mediation P.E.I.

Frank Bulger, President

Wednesday, May 27, 1998

Thursday, May 28, 1998

Diane Griffen

P.E.I. Advisory Council on the Status of Women

Mary Nicholson, Member

Sharon O'Brien, Chair

P.E.I. Provincial Child Sexual Abuse Advisory Committee

Rona Brown, Co-Chair

Elaine Rabinowitz, Member

People Concepts

Judy McCann-Beranger

Transition House Association

Joanne Ings, Executive Director

Barbara Gibson and Associates

Barbara Gibson

GRAND Society, New Brunswick Chapter

Barbara Baird, Legal Advisor

Wally Haines, President

As Individuals

Dennis Atchison

Bill Borland

Barbara Corbett

Alison Grenon

Lane MacIntosh

Giovanni Merlini

Terry Parks

Ken Paul

Brent Sherrard

Muriel McQueen Fergusson Centre for Family Violence Research

Rina Arsenault, Associate Director

Jennifer Robertson

New Brunswick Advisory Council on the Status of Women

Lucy Riedle, Chairperson

New Brunswick Shared Parenting Association

Melynda Jarratt, Member

Dan Weston, Member

Research and Advocacy Services

Associations and Individuals

Date

Monday, June 1, 1998

Tasha Barnett

Vaughn Barnett

University of New Brunswick

Jim Richardson, Professor, Chair, Department of Sociology

Canadian Pediatric Society

William Mahoney

Carleton University

Walter DeKeseredy, Professor

Centre Jeunesse Outaouais

Louise Carignan, Social Worker with Youth Protection

Everyman Magazine

David Shackleton, Editor and Publisher

Ex-Fathers

Barry Aubin

Lloyd Gorling, Founder

Family Mediation Centre of Peterborough

Patricia Houde, Mediator

Drew McLay, Mediator

Family Service Centre of Ottawa-Carleton

Kay Marshall

Sandy Milne, Co-Chair

Katherine Morrison, Co-Chair

FatherCraft Canada

Glen Cheriton, Editor and Researcher

Freedom for Kids

Nicholas Kovats

As Individuals

Brian Blak

Robert Bloom

Pierre Bougie

Allen Crawford

Ioe Rade

Marc Wickham

Associations and Individuals

Date

Entraide pères-enfants séparés

Wednesday, June 3, 1998

Thursday, June 4, 1998

Monday, June 8, 1998

Marc-André Pelletier, President

Harmony House

Leighann Burns-Campagna, Executive Director

As Individuals

James Atwill

Joseph Ben-Ami

Adrian Blackburn

Michael Blackburn

Lynne Cohen Ben-Ami

Laurent Denys

Richard Fortin

Margery Gallinger

Gordon Green

Linda Henderson

George Lloyd

Lubomyr Luciuk

Nash Smith

Christian S. Tacit

Men's Health Network

Nedra Lander

Danielle Nahon

National Alliance for the Advance of Non-Custodial Parents

Jason Bouchard

University of Sydney, Australia

Reg Graycar, Professor, Faculty of Law

As Individuals

Jim Gentle

Christopher Heeney

Leo Lehtiniemi

Louise Moreau

National Foundation for Family Research and Education

Adrienne Snow, Co-ordinator, Policy and Communications

Queen's University

Ross Finnie, School of Public Policy

Associations and Individuals

Date

Statistics Canada

Yvan Clermont

Mike Sheridan

Assembly of First Nations

Art Dedam, Director, Social Development

Wendall Nicholas, Advisor, Disabilities

Victor York, Chief

As Individuals

Ross Goodwin, Judge

Thomas J. Gove, Judge

Ken R. Halvorson, Judge

Lynn King, Judge

Mary Ellen Turpel-Lafond, Judge

James Williams, Judge

Métis National Council

Lance LaRose, Executive Director, Métis Family and Community Justice Services Inc., Métis Nation of Saskatchewan

Sonia Prevost-Derbecker, Acting Executive Director, Louis Riel Institute, Manitoba Métis Federation

Métis National Council of Women

Alma Adams, President, Métis Women of Ontario

Sheila D. Genaille, President, Métis National Council of Women

Janice Henry, President, Métis Women of Saskatchewan

Native Women's Association of Canada

Marilyn Buffalo, President

Pauktuutit (Inuit Women's Association)

Veronica Dewar, President

Mary Matoo, Member, Kivalliq Regional Board

Tracy O'Hearn, Co-ordinator, Special Projects

Secretary of State (Children and Youth)

Hon, Ethel Blondin-Andrew

Secretary of State (Multiculturalism) (Status of Women)

Hon. Hedy Fry

Wednesday, June 10, 1998

Monday, November 2, 1998



APPENDIX II

Submissions received from organizations

Ad Hoc Committee on Custody and Access Reform

Alberta Federation of Women United for Families

Assembly of First Nations

Association lien pères enfants de Québec, inc.

Association masculine d'entraide pour la famille

Association of Separated and Divorced Women

Association to Reunite Grandparents and Families

B.C. Yukon Society of Transition Houses

Balance Beam

Barreau du Québec

Battered Women's Support Services

Boundary Women's Resource Centre

C.H.A.N.C.E.S. Inc. Family Resource Centre

Calgary Ad Hod Committee on Children's Rights

Calgary Divorced Parents' Resources

Calgary Status of Women Action Committee

Canadian Association of Retired Persons

Canadian Bar Association

Canadian Coalition for the Rights of Children

Canadian Grandparents' Rights Association (Alberta)

Canadian Grandparents' Rights Association (Ottawa)

Canadian Mothercraft of Ottawa-Carleton

Canadian Paediatric Society

Carbonear Legal Aid

CARe, the Children at Risk Committee

Carleton University

Central Toronto Youth Services, Research and Program Development

Child Find Alberta

Child Welfare League of Canada

Children's Advocate Office, Alberta

Children's Aid Society of Ottawa-Carleton

Children's Rights Centre

Children's Voice (The)

Chisholm, Gafni & Block

Coalition of Canadian Men's Organizations (CCMO)

Committee of the Legal Profession of the Province of Saskatchewan

Community Action Program for Children—Nova Scotia

Community Legal Information Association of Prince Edward Island

Community Network on Custody and Access of Durham Region

DADS Canada

Dalhousie Legal Aid Services

Dick Freeman Society

Easton Alliance for the Prevention of Family Violence

ÉGALE (Equality for Gays and Lesbians Everywhere)

Equal Parents of Canada

Equitable Child Maintenance & Access Society (Edmonton Chapter)

Equitable Child Maintenance and Access Society (Calgary Chapter)

Everyman Magazine

F.E.D.—U.P. (Fathers Equally Deserve Unrestricted Parenthood)

Fairness in Family Law

Families Against Deadbeats (F.A.D.)

Families in Transition

Family Conflict Resolution Services

Family Mediation Canada

Family Rights Association of Nova Scotia

Family Services Canada

Family Services of Greater Vancouver

FatherCraft Canada

Fathers Are Capable Too (FACT)

Fathers For Equality

Fathers Rights Action Group

Fédération des associations de familles monoparentales et recomposées du Québec

FREDA

Freedom for Kids

Girl Guides of Canada

G.R.A.N.D. Society (Manitoba Chapter) (Grandparents Requesting Access & Dignity)

G.R.A.N.D. Society (Ottawa Chapter) (Grandparents Requesting Access & Dignity)

Goldwater Dubé

Grandparents Raising Grandchildren Toronto (Canada)

Groupe d'action des pères pour le maintien des liens familiaux (GAPMLF)

Guyatt & Gaasenbeek

Helping Unite Grandparents and Grandchildren

Heritage of Children Canada

International Social Services

Islamic Society of North America

Justice for Children

Kamloops Women's Resource Centre

Kelowna Women's Resource Centre

Report of the Special Joint Committee on Child Custody and Access

Kids Need Both Parents

Ksan House Society Counselling Services

London Battered Women's Advocacy Centre

London Coordinating Committee to End Woman Abuse

London Status of Women Action Group

Low Impact Divorce Program Inc.

Macnutt & Dumont

Mainland South Committee Against Woman Abuse

Manitoba Family Services

Mediation PEI, Inc.

Merchant Law Group

Metis National Council of Women

Ministry of Women's Equality

Mississauga Children's Rights

Mom's House-Dad's House

Montreal Men Against Sexism

National Alliance for the Advancement of Non-Custodial Parents

National Association of Women and the Law

National Council of Women of Canada

New Brunswick Advisory Council on the Status of Women

New Brunswick Shared Parenting Association

New Directions

New Vocal Man Inc.

Niagara-on-the-Lake Chapter of Grandparents Raising Grandchildren

Non-Custodial Parents of Durham—NCPD

Nova Scotia Shared Parenting Association, B.C.

Office of Child and Family Service Advocacy

Office of the Child, Youth & Family Advocate, British Columbia

Ontario Association of Interval and Transition Houses (OAITH)

Ontario Association of Social Workers

Organization for the Protection of Children's Rights (OPCR)

Orphaned Grandparents Association

Ottawa-Carleton Regional Police Service

Parent & Carr, Barristers & Solicitors

Parents Helping Parents

Parents Without Custody

Pauline Jewitt Institute of Women's Studies

Peer Support Services for Abused Women

PEI Advisory Council on the Status of Women

Penticton and Area Women's Centre (PAWC)

Provincial Advisory Council on the Status of Women, Newfoundland and Labrador

Provincial Association of Transition Houses, Saskatchewan

Provincial Child Sexual Abuse Advisory Committee, P.E.I.

RCMP Missing Children's Registry

R.E.A.L. Parents for Justice

REAL Women of Canada

Regional Coordinating Committee to End Violence Against Women

Reierson Sealey, Barristers & Solicitors

Réseau Nemesis Network

Saskatchewan Action Committee on the Status of Women

Saskatchewan Battered Women's Advocacy Network

Separated Fathers Inc.

Transition House Association of Nova Scotia

Unified Family Court, St. John's, Newfoundland

Vancouver Coordinating Committee on Violence Against Women in Relationships

Vancouver Custody & Access Support and Advocacy Association (VCASAA)

Victoria Men's Centre

W. Glen Howe & Associates

Women's Centres CONNECT

Women in Action

Women's Resource Society

Yew Transition House

YWCA Children Who Witness Abuse Program of Greater Vancouver

YWCA Munroe House

YWCA of Canada

APPENDIX III

Submissions received from individuals

Julie Black

A

C. Adams Wayne Addison Babatunde Agbi Mobarak Ali Wayne Allan Madeleine Allen Jenny Anderson Kristine Anderson Beverly Andrews Verne Andrusiek Leonard Andrychuk Doreen Arbuckle Jerry Arthur-Wong Dennis Atchison Barbara Atwill James Atwill Mary Atwill Erik L. Austin

В

Richard A. Babich Ronald D. Bailey Ross Alfred Bailey Nicholas Bala Paul C. Balint D. Barnes Vaughn Barnett Leslie Barter Debbie Beach Barbara Beaudette Lynanne Beck Karen M. Beekers Joseph Ben-Ami Moray Benoit John Bergen Emilia Betkova Larry Birbeck

Jim Bishop

Bryan Black Michael Blackburn Charles Blair Brian J. Blak Robert J. Bloom Laurent Boileau Jacques Boucher Frank Boyd Susan B. Boyd Margaret Bradley Peter Bradley Mark Brodrick Hal Brown Carol Leonard Brownell Dennis Brunet Réjean Buissières

\mathbb{C}

Brent R. Burns

Margaret L. Busche

Cliff Busche

Roy Buska

Gillian Butler John Byers

Jeanne Byron

Daniel Cabernel
Rusell and Elsie Cable
Ron Campbell
Paul Carrier
Glen Cartwright
Daniel I. Carroll
Darlene Ceci-Laws
George Charpentier
Dwayne Charpontier
Yat-Fan Chau
Gerald D. Chipeur
Yvonne Choquette
F. M. Christensen
Jenifer Christenson

Jack Christopher Salvatore Cino E. Pauline Clark

Rob Cocroft

Lynne Cohen Ben-Ami

Christopher Cole

Judy Cole

Leyton Collins

H. Cook

Edward I. Corner

Gary Corriveau

Kheath Cote

Byrnece G. Cortens

Tony Costa Dan Cox

Allen Crawford

Jim Croft

Duncan Croll

Robert Cross

Sean B. Cummings

D

Dann and Donna Dabels

Sheridan Dahlgren

Steve P. Daly

Peter Dauphinee

Ana David

Wayne D. Davidson

James Dawson

Martin Dawson

Nicole Deagan

David A. Decker

Margaret Decorte

Walter DeKeseredy

Barry Demeter

Anne Ross Demeter

Daniel DeMille

Wendy Dennis

Laurent Denys

Ebrahim Desai

Yvon Desilets

Tana Dineen

Blaine Dodds

David Dodd

Wayne W.P. Doney

Shirley Donnelly

Alex Doulis

Roxann Draper

Joel Duchoeny

Ernie Duffy

Dianne Duggan

\mathbf{E}

G. Engstroem-Sariyan

Dorothy Emery

Ron Evans

F

Paul Fedynich

Paul Fenton

Gordon J. Ferguson

Barbara Jo Fidler

Dave Filan

Warren Fink

Doug Fitzgerald Jr.

John Fleurie

James L. Floyd

Frank and Marcella Folkmann

Peter Folkmann

Bill Forbes

Bryan Forbes

Mary Forbes

Anne Ford

Peggy Foy

Cynthia Fraser

Marius Frederick

Willard French

Wilfred Fromm

Yvonne Froscer

Yvonne C. Frosch

Deryk Fullerton

G

François Gadoury

Stan E. Gal

Margery J. Gallinger

Glenn Galloway

Patricia Gartshore

Hilda Gee

Lionel Gendreau

Karen Gibbs

Barbara Gibson

Betty Gill

Report of the Special Joint Committee on Child Custody and Access

Ian Gillespie

Gray Gillespie

Thelma Gillespie

George Godfrey

S. Goldenberg

Rosalind Golfman

Arthur Gorski

Ashok Goyal

Christopher Gratton-Mathiesen

Darcy Gray

Frank A. Greco

Doug Griffin

Kelly J. Grymaloski

Frank E. Gullich

Peter Gumplinger

H

George Haeh

James Haiden

Bruce Haines

Gordon Haire

Terry Haire

K. Haka-Ikse

Avril Hanson

R. Harper

George Harvey

Kathleen Harvey

Robert Harvey

Jeff Hassim

Barbara Hawkins

Dawson G. Hay

Murray Hebblethwaite

Christopher Stephen Heeney

Albert Hein

David Hems

Laura Henderson

Dwayne Edward Hidson

Russell D. Hill

Brian Hindmarch

Robert Michael Hnatyshyn

J. Hofer

Lori Hogg

Joseph P. Hornick

Teresa Houle

Dave Hueglin

Dianne J. Humeniuk

John W. Humphrey

Rob Huston

I

Donna Irving

Howard Irving

Glenn Ivall

J

Ray Jackle

Peter Jaffe

Adam Jakobi

Bill James

Tim Jelinski

Brian K. Jenkins

Lynne Jenkinson

Anne Johnman

Violet Johnson

Douglas R. Johnston

Lena K. Jones

Linda Jones

Stephen Jones

T 1 T 1

Jack Judge

Betty Junior

K

Brenda Rose Kallenbach

Elliott Katz

Gerald Kearns

Richard L. Kelso

Geraldine Frances Keough

Gene Keyes

Jane King

Wayne Kliewer

Rosalie Knowles

William (Bill) Knowles

Pamela Koch

Mike Kohlfurst

Dev S. Kohli

Mary Ann Kotana

Mike Krane

Edward Kruk

Ron Kuban

L

John Lajeunesse

Barbara Landau

Barbara Landers

Ken Langille

Michele Laronde

Kathleen Lavelle

Kevin J. Laventure

Maurice G. Lavoie

Michael Lawler

Kevin B. Laws

Eric Leblanc

Céline Le Bourdais

Jasmine Lee Powers

Ronda Leeson

Andrew Legun

Leo Lehtiniemi

Ginette Lemoine

Keri and Simon Lester

Randy Liberet

Carey Linde

George E. Lloyd

Tracy London

Art Lowe

Lubomyr Luciuk

Paule Luke

Diane Lve

Trevor Lynch

M

Michael Wayne MacBurnie

Brian MacKay

Lynn Mackay

Ross MacKay

Alasdair Gordon MacKinnon

Viki MacKinnon

Dave Maharajh

Florence Maltesse

Cynthia Marchildon

Nicole Marcil-Gratton

Soniia Marinovic

Roy Marokus

Harvey Maser

Dan R. Mason

Anne Masson

Catherine Anne Matheson

M. Keith Mattinson

John Maycock

Hope Mazur

Judy McCann-Beranger

L. McCaulev

Mark McDowall

Wilbert McKeen

Dennis McKenzie

Marlene McKever

Robert McKim

Terry McKone

John McLean

Eugene McLeon

Mary McLeon

Ian E. McNeil

Cvnthia McRonald

Lillian Mead

Giovanni A. Merlini

Gordon Mertler

Tom Mesi

Margaret Michaud

Paul Millar

Ed Miller

Geri Miller

Kerrin Miller

Stefan Mirek

Thomas Mitchell

K. Moffatt

Donald S. Moir

Sharon Mollov

Andrea Monahan

Gerald Money

Cerise Morris

Maureen Morrison

Richard Morrison

Wayne Morsky

Sidney Moscaliuk

Ray Mrowietz

Ross Munro

Stewart A. Murdock

Colleen G. Murphy

Sharyn Murphy

Tammy Murrell

Laura Mythe

N

Steven Nelson

Gabriel Nicholas

Paul and Pam North

 \mathbf{O}

Dave O'Leary

Dave Omah-Maharajh

Gordon Onley

Stephen Charles Osborne

Peter J. Ostrowski

Denis Paquette

Greg Parker

Deborah Parker-Loewen

J.W. Terrence Parks

Brian L. Parsons

Oliver Pastor

Donald Partridge

Irwin Patterson

Jeffrey Patterson

Ken Paul

Shirley Pekilis

Teresa Pelletier

Brian Pepper

Brent Percival

Bryon Percival

Paula Perrins

Abe and Harriet Peters

Theresa Petkau

Jim Petrin

Jacques Pettigrew

Eike Pfister

Nillo Piccinin

Michael Pinsent

Virginia I. Pipe

Philip Pocock

Ashlev Pond

Josephine Pronger

Brian Purnell

Duane Pustanyk

R

Vera Rabie-Azoory

Alexandra Raphael

Cameron Guy Rawlinson

Ken G. Read

André and Gisèle Reid

Blake Richards

Jim Richardson

Richard Roach

Jeanne E. Roberts

P. Robinson

Ellena Ronald

Daniel Rosensweig

François Routhier

Lori Rov

Terence Rowley

Brian H. Ruddell

Audrey Ryan

Sheila Ryan Monette

John Ryrie

Veenu Saini

Delbert Scace

Cliff Scott

Keith Scott

Paul Scott

Suzanne Séguin

George Seitz

Larry H. Shaak

Ann Sherman

Larry Simpson

Steve Slute

Marion Smith

Della M. Snow

Feva Sodhi

Ian Solloway

Reena Sommer

Michael Spencer

Nicholas Spencer-Lewin

Darlene Spooner

Lois Sprague

Albert Sproule

Joseph F. Stafford

Douglas Staines

Dorothy Stauffer

Mike Stevenson

Darryl Stewart

Eva Stewart

Tracy Stewart

Bill Stimson

Margaret Stimson

Wayne A. Street

Paul Szczucinski

Eldon Szeles

Robert St. Vincent

T

Christian Tacit
Brenda Taks
Avi N. Tal
John W. Tapel
Marilyn Teague
Eric Teed
John Thayer Hoff
Guy Thisdelle
Andrew Gordon Thompson
D.A. Rollie Thompson
Derek Thorpe
Laurie Tochor
Chris Townson

U

Charles Traynor

Tom Trevail

Cynthia Underhill-Christopher Rosemary Underwood Eugene Upshall E. Jane Ursel

V

Janet L., VanAlstyne Ron Van Brenk Joseph Van Damme John Vander Kooij Gary P. Verhey Raymond Versteeg John Viinalass Glyn Viner June M. Vos Dave Vossen Brian Vroomen

W

Jennifer A. Wade Richard Wagner Christine Wallace Mario Walsh Joyce Warcop William B. Warrick Gary Webb Stephen Webster Cheryl White Larry White M. Wilde Jeffrey Wilson Nancy A. Wilson Robert Wilson David Windrum Alan W. Wintemute Joern H.R. Witte Joern H.R. Witte Jim Woloshen Glenna Wood Max and Constance Woodhouse Laura Wythe

\mathbf{Y}

Donald G. Yeo Harold B. Young Joel Young Ellen Yurick

\mathbf{Z}

Marlene Zawierucha Elaine Zotter

MINUTES OF PROCEEDINGS

TUESDAY, DECEMBER 1, 1998 (Meeting No. 55)

[Text]

The Special Joint Committee on Child Custody and Access met *in camera* at 3:45 p.m. this day, in Room 705, La Promenade Building, the Joint Chairs, the Hon. Landon Pearson and Roger Gallaway, presiding.

Members of the Committee present:

From the Senate: The Honourable Senators Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson.

From the House of Commons: Eleni Bakopanos, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield, Caroline St-Hilaire and Diane St-Jacques.

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer; Ron Stewart, Research Advisor.

Pursuant to its Orders of Reference from the Senate dated October 28, 1997 and from the House of Commons dated November 18, 1997, the Committee resumed its study on Child Custody and Access.

The Committee resumed its consideration of a draft report.

At 5:20 p.m., the sitting was suspended.

The sitting resumed in camera on Wednesday, December 2, 1998, at 3:41 p.m. in Room 705, La Promenade Building.

The Members convened were:

From the Senate: The Honourable Senators Erminie J. Cohen, Anne C. Cools, Mabel M. DeWare, Marian Maloney and Landon Pearson.

From the House of Commons: Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini and Philip Mayfield.

Acting Member present: Pierrette Venne for Caroline St-Hilaire.

In attendance: From the Library of Parliament: Kristen Douglas, Research Coordinator and Margaret Young, Research Officer; Ron Stewart, Research Advisor.

The Committee resumed its consideration of a draft report.

At 5:36 p.m., the sitting was suspended.

At 5:45 p.m., the sitting resumed.

On motion of Senator Erminie Cohen, *it was agreed*, — That the draft report entitled <u>For the Sake of the Children</u> be adopted as the Report of the Committee to Parliament.

On motion of Senator Mabel DeWare, it was agreed — That the Committee authorize the printing of the dissenting opinions of the Reform Party, the Bloc Québécois and the New Democratic Party as appendices to this report, to be printed after the signature of the Joint Chairs.

On motion of Sheila Finestone, *it was agreed* — That pursuant to Standing Order 109 of the House of Commons, the Committee request that the Government table a comprehensive response to this report.

On motion of Judi Longfield, *it was agreed* — That the Committee instruct the Joint Chairs to present the Report of the Committee as adopted in their respective Chambers.

On motion of Nancy Karetak-Lindell, *it was agreed* — That the Committee authorize the printing of 5,000 copies of the Report of the Committee and that if additional funds are remaining in the Committee's budget after the first printing, additional copies be authorized.

On motion of Madeleine Dalphond-Guiral, it was agreed — That the Committee authorize the destruction, after one year of the date of presentation of the Committee's Report, of all in camera transcripts of the Committee's proceedings.

At 6:35 p.m., the Committee adjourned to the call of the Chair.

CATHERINE PICCININ / RICHARD RUMAS

Joint Clerks of the Committee

ACKNOWLEDGEMENTS

This study would not have been possible without the assistance and dedication of a great many people.

Committee Staff

Joint Clerks:

Catherine Piccinin

Richard Rumas

Research Team:

From the Library of Parliament, Research Branch:

Kristen Douglas, Research Co-ordinator

Margaret Young

Consultant:

Ron Stewart

Administrative Assistants/Officers:

Gisèle Beauchemin Korry Duckworth

Till Heyde Justine Langham

Nathalie Labelle Debbie Larocque-Pizzoferrato

Richard Ménard Lise Tierney

Karen Titley

Revisers/Editors:

Angèline Fournier Kathryn Randle

The Committee worked long hours over many months requiring the services of a large number of procedural, research and administrative officers, editors, reporters, interpreters, translators, messengers, publications, broadcasting, printing, technical and logistical staff who ensured the progress of the work and the Report of the Committee. We wish to extend our appreciation for their efficiency and hard work.





Parlement du Canada

Pour l'amour des enfants



Rapport du Comité mixte spécial sur la garde et le droit de visite des enfants Décembre 1998



Coprésidents L'honorable Landon Pearson Roger Gallaway, député Le Président de la Chambre des communes accorde, par la présente, l'autorisation de reproduire la totalité ou une partie de ce document à des fins éducatives et à des sins d'étude privée, de recherche, de critique, de compte rendu ou en vue d'en préparer un résumé de journal. Toute reproduction de ce document à des fins commerciales ou autres nécessite l'obtention au préalable d'une autorisation écrite du Président. Si ce document renserme des extraits ou le texte intégral de mémoires présentés au Comité, on doit également obtenir de leurs auteurs l'autorisation de reproduire la totalité ou une partie de ces mémoires. Aussi disponible par Parliamentary Internet Parlementaire: http://www.parl.gc.ca En vente: Travaux publics et Services gouvernementaux Canada — Édition, Ottawa, Canada K1A 0S9

COMITÉ MIXTE SPÉCIAL SUR LA GARDE ET LE DROIT DE VISITE DES ENFANTS

COPRÉSIDENTS

L'honorable Landon Pearson et Roger Gallaway

REPRÉSENTANT LE SÉNAT

Les honorables sénateurs :

Erminie J. Cohen Mabel M. DeWare
Joan Cook Marian Maloney

Anne C. Cools

REPRÉSENTANT LA CHAMBRE DES COMMUNES

Diane St-Jacques

Eleni Bakopanos Judi Longfield
Carolyn Bennett Eric Lowther
Robert Bertrand Peter Mancini
Madeleine Dalphond-Guiral Philip Mayfield
Sheila Finestone Denis Paradis
Paul Forseth Caroline St-Hilaire

John Harvard

Dont la nomination a été approuvée en vertu d'une motion du Sénat :

Les honorables sénateurs :

Nancy Karetak-Lindell

Bosa, Cohen, Cools, DeWare, Ferretti Barth, Jessiman and Pearson — (7)

Cogreffiers du Comité
Catherine Piccinin et Richard Rumas

Recherchiste

Kristen Douglas and Margaret Young

Bibliothèque du parlement

Ron Stewart, consultant

AUTRES SÉNATEURS AYANT PARTICIPÉ AUX TRAVAUX DU COMITÉ :

Les honourable sénateurs:

John Finlay

Gar Knutson

Gérald A. Beaudoin Rose Marie Losier-Cool

Peggy Butts Shirley Maheu
Thelma Chalifoux Lorna Milne
Joyce Fairbairn Wilfred Moore
Marissa Ferretti Barth Pierre Claude Nolin

Jean Forest Lucie Pépin

Jacques HébertRaymond PerraultDuncan JessimanGerry St. GermainMarjory LeBretonJohn Lynch Staunton

Derek Lewis Charlie Watt

AUTRES DÉPUTÉS AYANT PARTICIPÉ AUX TRAVAUX DU COMITÉ :

Hélène Alaire Gary Lunn Claudette Bradshaw Gurbax Mahli Pierre Brien Steve Mahoney John Bryden John Maloney Elinor Caplan Richard Marceau Marlene Catterall Larry McCormick Denis Coderre John McKay Shaunessy Cohen Peter McKay Libby Davies Ian Murray Lynn Myers Bev Desjardins

Bev DesjardinsLynn MyersWayne EasterBernard PatryKen EppPauline Picard

Jocelyn Girard-Bujold Carmen Provenzano
Deborah Grey Karen Redman
Ivan Grose John Richardson
Monique Guay Guy St-Julien

Dick Proctor

Pierrette Venne

Mac HarbMonte SolbergJay HillPeter StofferCharles HubbardPaul SzaboBob KilgerPaddy Torsney

Walt Lastewka Judy Wasylycia-Leis

LE COMITÉ MIXTE SPÉCIAL SUR LA GARDE ET LE DROIT DE VISITE DES ENFANTS

a l'honneur de présenter son

DEUXIÈME RAPPORT

Nota: Le Premier rapport du Comité prévoyait le report de la date du rapport final du Comité.

AVANT-PROPOS

En décembre 1997, Le Comité mixte spécial sur la garde et le droit de visite des enfants a entrepris de relever un défi de taille : examiner les questions relatives aux modalités régissant la garde des enfants et le droit de visite après la séparation ou le divorce des parents en insistant surtout sur les « besoins et le meilleur intérêt » des enfants. Nous savions au départ que ces questions étaient des plus préoccupantes pour les Canadiens, mais nous avons vite constaté que le problème avait des dimensions qu'aucun de nous ne soupçonnait. Heureusement, le Comité a profité des compétences et des connaissances considérables et variées des 23 sénateurs et députés qui le composaient. À titre de coprésidents, nous saluons le dévouement et l'endurance dont ils ont fait preuve tout au long de cette étude. D'autres collègues sont venus écouter les témoins, parfois pour donner leur point de vue et quelques conseils, parfois pour relever temporairement l'un d'entre nous. Tous les membres ont su s'acquitter de leurs tâches exigeantes au sein du comité tout en assumant leurs autres responsabilités au Sénat, à la Chambre des communes et au sein d'autres comités.

Au cours des douze mois qu'a duré notre étude, le Comité a tenu 55 séances et entendu plus de 520 témoins. Il s'est efforcé d'en entendre le plus possible, tant à Ottawa que dans les nombreuses villes du Canada où il s'est rendu pour tenir ses audiences publiques. Celles—ci avaient le même caractère que le sujet à l'étude. La question est des plus importantes et a une forte charge émotive, comme en fait foi le nombre de personnes qui ont assisté à nos audiences dans chaque ville où le Comité s'est arrêté. Leur nombre créait à chaque audience une tension palpable. Chaque jour, les membres du Comité ont écouté attentivement un large éventail d'opinions et de points de vue. De même, des questions spécifiques ont été posées aux témoins. Les questions de ce type font partie intégrante du processus parlementaire; elles sont le pendant des contre—interrogatoires auxquels on procède dans tous les tribunaux. Le rapport qui suit est le fruit de l'apport de tous les témoins et rend bien toute la diversité et la richesse des témoignages entendus.

Nous voudrions remercier les nombreux témoins qui ont comparu devant nous, les professionnels du domaine juridique, de la santé mentale, du développement de l'enfant, de la protection de l'enfance, du milieu universitaire et d'autres secteurs qui ont suggéré tant de modifications et d'améliorations aux systèmes et aux lois qui s'appliquent aux enfants du divorce; les divers organismes représentant les nombreuses facettes de la question; et surtout les particuliers qui ont partagé avec nous leurs cas personnels afin de nous aider à mieux comprendre le problème. Ce sont ces derniers témoins qui ont donné sa dimension humaine au sujet difficile que nous devions étudier.

Le Comité a aussi reçu des centaines de lettres et de mémoires détaillés de citoyens et de professionnels préoccupés par différents aspects de notre étude. Leurs commentaires et leurs recommandations ont été pris en considération.

Lorsqu'il s'est réuni pour rédiger l'ébauche de son rapport, le Comité a réfléchi de longues heures aux recommandations qu'il ferait au Parlement. Chaque membre y est allé de sa propre expérience pour aider à comprendre les questions juridiques, sociales et autres entourant l'exercice des responsabilités parentales après le divorce et la séparation. Nous n'étions pas toujours totalement d'accord, mais nous nous sommes toujours efforcés d'en venir à un consensus sur de nombreux aspects importants, de partager et d'écouter.

Nous espérons que le présent rapport, « Pour l'amour des enfants », aidera le public à mieux comprendre un sujet très complexe qui touche de nombreux Canadiens et qu'il constituera une première étape importante dans la recherche de solutions aux problèmes soulevés. Mais le Comité espère avant tout que ses recommandations favoriseront l'émergence d'une culture soucieuse d'éviter les conflits plutôt que de les alimenter.

HON. LANDON PEARSON

ROGER GALLAWAY

Coprésidents

ORDRES DE RENVOI

Extrait des Journaux du Sénat du 28 octobre 1997:

Reprise du débat sur la motion de l'honorable sénateur Pearson, appuyée par l'honorable sénateur Carstairs,

Que soit formé un comité mixte spécial du Sénat et de la Chambre des communes chargé d'examiner et d'analyser les questions des ententes concernant l'éducation des enfants après la séparation ou le divorce des parents. Plus particulièrement, que le comité mixte soit chargé d'évaluer le besoin d'une approche davantage centrée sur les enfants dans l'élaboration des politiques et des pratiques du gouvernement en droit de la famille, c'est-à-dire une approche qui mette l'accent sur les responsabilités des parents, plutôt que sur leurs droits, et sur les besoins des enfants et leur meilleur intérêt, au moment de la conclusion des ententes concernant l'éducation des enfants;

Que le comité mixte soit formé de sept sénateurs et seize députés avec deux coprésidents;

Que tout changement dans la députation influant sur la composition des membres du comité prenne effet immédiatement après que l'avis signé par la personne agissant à titre de whip en chef d'un parti reconnu a été déposé auprès du secrétaire du comité;

Qu'il soit ordonné au comité de mener de vastes consultations et d'examiner les démarches adoptées à l'égard de ces questions au Canada et dans les régimes gouvernementaux comparables;

Que le comité ait le pouvoir de siéger pendant les séances et les périodes d'ajournement du Sénat;

Que le comité ait le pouvoir de faire rapport de temps à autre, de convoquer des témoins, de demander le dépôt de documents et de dossiers, et de faire imprimer des documents et des témoignages dont le comité peut ordonner l'impression;

Que le comité ait le pouvoir de recourir aux services d'experts, notamment de conseillers juridiques, de professionnels, de techniciens et d'employés de bureau;

Que le quorum du comité soit fixé à douze membres lorsqu'il a prise d'un vote, d'une résolution ou d'une décision, à la condition que les deux Chambres soient représentées et que les coprésidents soient autorisés à tenir des réunions, à entendre des témoignages et à autoriser leur impression, pourvu que six membres du comités soient présents et que les deux Chambres soient représentées;

Que le comité soit habilité à désigner certains de ses membres pour constituer autant de sous-comités qu'il le jugera utile, et à déléguer aux dits sous-comités la totalité ou une partie de ses pouvoirs, à l'exception de celui de faire rapport au Sénat et à la Chambre des communes;

Que le comité ait le pouvoir d'autoriser la télédiffusion et la radiodiffusion de tous ses travaux;

Que le comité présente son rapport final au plus tard le 30 novembre 1998; et

Qu'un message soit transmis à la Chambre des communes pour l'en informer.

Après débat,

En amendement, l'honorable sénateur Cools propose, appuyé par l'honorable sénateur Watt, que la motion soit modifiée en :

a) supprimant le paragraphe 1 et en le substituant par ce qui suit :

« Que soit formé un comité mixte spécial du Sénat et de la Chambre des communes chargé d'examiner et d'analyser les questions des ententes concernant la garde, les droits de visite et l'éducation des enfants après la séparation ou le divorce des parents. Plus particulièrement, que le comité mixte soit chargé d'évaluer le besoin d'une approche davantage centrée sur les enfants dans l'élaboration des politiques et des pratiques du gouvernement en droit de la famille, c'est-à-dire une approche qui mette l'accent sur les responsabilités de chaque parent et sur les besoins des enfants et leur meilleur intérêt, au moment de la conclusion des ententes concernant l'éducation des enfants; » et

b) en ajoutant après le paragraphe 9 ce qui suit :

« Que le comité ait le pouvoir de se déplacer d'un endroit à l'autre au Canada et à l'étranger; ».

Après débat,

La motion en amendement, mise aux voix, est adoptée.

La motion principale, telle que modifiée, mise aux voix, est adoptée.

ATTESTÉ :

Le Greffier du Sénat, Paul Bélisle

Extrait des Journaux du Sénat du 19 Novembre 1998:

Étude du premier rapport du Comité mixte spécial sur la garde et le droit de visite des enfants (*report de la date du rapport*), présenté au Sénat le 17 novembre 1998.

Le MARDI 17 novembre 1998

Le Comité mixte spécial sur la garde et le droit de visite des enfants à l'honneur de présenter son

PREMIER RAPPORT

Conformément à l'ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le Comité a examiné la question des dispositions relatives à la garde et au droit de visite des enfants après une séparation et un divorce et il a convenu :

Que le Comité mixte spécial sur la garde et le droit de visite des enfants soit autorisé à poursuivre ses délibérations au-delà du 30 novembre 1998 et qu'il présente son rapport final au plus tard le 11 décembre 1998.

Un exemplaire du procès-verbal pertinent est déposé à la Chambre des communes.

L'honorable sénateur Pearson propose, appuyé par l'honorable sénateur Butts, que le rapport soit adopté.

Après débat,

La motion, mise aux voix, est adoptée.

ATTESTÉ :

Le Greffier du Sénat, Paul Bélisle

Extrait des Journaux de la Chambre des Communes du 18 novembre 1997 :

Mme McLellan (ministre de la Justice) propose, appuyée par M. Kilgour (secrétaire d'État (Amérique latine et Afrique)), —

Que soit formé un comité mixte spécial du Sénat et de la Chambre des communes chargé d'examiner et d'analyser les questions des ententes concernant la garde, les droits de visite et l'éducation des enfants après la séparation ou le divorce des parents. Plus particulièrement, que le comité mixte soit chargé d'évaluer le besoin d'une approche davantage centrée sur les enfants dans l'élaboration des politiques et des pratiques du gouvernement en droit de la famille, c'est-à-dire une approche qui mette l'accent sur les responsabilités de chaque parent et sur les besoins des enfants et leur meilleur intérêt, au moment de la conclusion des ententes concernant l'éducation des enfants;

Que le comité mixte soit formé de sept sénateurs et seize députés avec deux coprésidents;

Que tout changement dans la députation influant sur la composition des membres du comité prenne effet immédiatement après que l'avis signé par la personne agissant à titre de whip en chef d'un parti reconnu a été déposé auprès du secrétaire du comité;

Qu'il soit ordonné au comité de mener de vastes consultations et d'examiner les démarches adoptées à l'égard de ces questions au Canada et dans les régimes gouvernementaux comparables;

Que le comité ait le pouvoir de siéger pendant les séances et les périodes d'ajournement du Sénat;

Que le comité ait le pouvoir de faire rapport de temps à autre, de convoquer des témoins, de demander le dépôt de documents et de dossiers, et de faire imprimer des documents et des témoignages dont le comité peut ordonner l'impression;

Que le comité ait le pouvoir de recourir aux services d'experts, notamment de conseillers juridiques, de professionnels, de techniciens et d'employés de bureau;

Que le quorum du comité soit fixé à douze membres lorsqu'il y a prise d'un vote, d'une résolution ou d'une décision, à la condition que les deux Chambres soient représentées et que les coprésidents soient autorisés à tenir des réunions, à entendre des témoignages et à autoriser leur impression, pourvu que six membres du comités soient présents et que les deux Chambres soient représentées;

Que le comité soit habilité à désigner certains de ses membres pour constituer autant de sous-comités qu'il le jugera utile, et à déléguer aux dits sous-comités la totalité ou une partie de ses pouvoirs, à l'exception de celui de faire rapport au Sénat et à la Chambre des communes;

Que le comité ait le pouvoir de se déplacer d'un endroit à l'autre au Canada et à l'étranger;

Que le comité ait le pouvoir d'autoriser la télédiffusion et la radiodiffusion de tous ses travaux;

Que le comité présente son rapport final au plus tard le 30 novembre 1998; et

Qu'un message soit transmis au Sénat pour l'en informer.

ATTESTÉ :

Le Greffier de la Chambre des communes, Robert Marleau

Extrait des Journaux de la Chambre des Communes du 18 novembre 1998:

Du consentement unanime, il est résolu, — Que le 1^{er} rapport du Comité mixte spécial sur la garde et le droit de visite des enfants, présenté le mardi 17 novembre 1998, soit agréé.

Le MARDI 17 novembre 1998

Le Comité mixte spécial sur la garde et le droit de visite des enfants à l'honneur de présenter son

PREMIER RAPPORT

Conformément à l'ordre de renvoi reçu du Sénat le 28 octobre 1997 et à celui reçu de la Chambre des communes le 18 novembre 1997, le Comité a examiné la question des dispositions relatives à la garde et au droit de visite des enfants après une séparation et un divorce et il a convenu :

Que le Comité mixte spécial sur la garde et le droit de visite des enfants soit autorisé à poursuivre ses délibérations au-delà du 30 novembre 1998 et qu'il présente son rapport final au plus tard le 11 décembre 1998.

Un exemplaire du procès-verbal pertinent est déposé à la Chambre des communes.

ATTESTÉ :

Le Greffier de la Chambre des communes, Robert Marleau

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Résumé des recommandations

- 1. Le Comité recommande que la *Loi sur le divorce* soit modifiée de façon à inclure un préambule qui ferait ressortir les grands principes de la *Convention des Nations Unies relative aux droits de l'enfant.* (page 23)*
- 2. Conscient que les relations parents-enfants ne prennent pas fin avec la séparation ou le divorce, le Comité recommande de modifier la *Loi sur le divorce* en y ajoutant en préambule le principe selon lequel les parents divorcés et leurs enfants ont le droit d'entretenir des rapports étroits et permanents les uns avec les autres. (page 23)
- 3. Reconnaissant le principe de l'intérêt supérieur de l'enfant, le Comité recommande que :
 - les enfants puissent être entendus lorsque des décisions sur les responsabilités parentales les concernant sont prises;
 - les enfants dont les parents sont en instance de divorce aient l'occasion d'exprimer leurs points de vue à un professionnel compétent dont le rôle serait de faire connaître ces points de vue au juge, à l'évaluateur ou au médiateur chargé de déterminer ou de faciliter les modalités de partage des responsabilités parentales;
 - si un enfant éprouve des difficultés lors de la séparation ou du divorce de ses parents, le tribunal doit avoir la possibilité de nommer une tierce partie concernée (comme un membre de la famille élargie de l'enfant), pour soutenir l'enfant et le représenter;
 - le gouvernement fédéral travaille avec les provinces et territoires afin de s'assurer que les structures, procédures et ressources adéquates soient en place pour permettre cette consultation, que ces décisions soient prises en vertu de la *Loi sur le divorce* ou des lois provinciales ou territoriales;
 - le Comité reconnaît que les enfants du divorce ont besoin et droit à la protection des tribunaux, selon les compétences respectives de ces derniers. (page 23)
- 4. Le Comité recommande que, lorsque le tribunal estime que l'intérêt supérieur de l'enfant l'exige, les juges soient habilités à désigner un avocat chargé de représenter l'enfant. Lorsqu'un avocat est désigné, il doit être mis à la disposition de l'enfant. (page 24)
- 5. Le Comité recommande de ne plus employer les termes « garde » et « accès » dans la *Loi sur le divorce* et de les remplacer par l'expression « partage des responsabilités parentales », qui inclut non seulement le sens de ces deux termes, mais doit être interprétée comme englobant aussi toutes les significations, les droits, les obligations et les interprétations dont ils sont assortis. (page 28)
- 6. Le Comité recommande que le Ministre de la Justice modifie la *Loi sur le divorce* de manière à en supprimer la définition du terme « garde » et à y ajouter une définition de l'expression « partage des responsabilités parentales » dans le sens donné à cette dernière par le Comité. (page 28)

^{*}Les numéros de page entre parenthèses indiquant l'endroit où les recommandations du Comité se trouvent dans le rapport.

- 7. Le Comité recommande que le gouvernement fédéral travaille avec les gouvernements provinciaux et territoriaux à modifier dans le même sens la terminologie de leurs lois sur la famille. (page 28)
- 8. Le Comité recommande que l'on rejette la « doctrine du bas âge » de la *Common Law* comme critère dans la prise de décision quant aux responsabilités parentales. (page 29)
- 9. Le Comité recommande que les deux parents reçoivent l'information et les dossiers concernant le développement et les activités sociales de l'enfant, comme le dossier scolaire, le dossier médical et d'autres renseignements pertinents. Cette obligation devrait incomber non seulement aux deux parents, mais aussi aux écoles, aux médecins, aux hôpitaux et à tous ceux qui sont à la source de ces informations ou dossiers, à moins qu'un tribunal n'en décide autrement. (page 29)
- 10. Le Comité recommande, que exception faite des cas où les deux parents se sont entendus au préalable, tous les parents qui font une demande d'ordonnance parentale soient tenus de participer à un programme d'éducation qui les aidera à mieux comprendre la manière dont parents et enfants réagissent au divorce, les besoins des enfants à diverses étapes de leur développement, les avantages qu'il y a à s'entendre sur l'exercice du rôle parental après le divorce, les droits et les responsabilités des parents, de même que la disponibilité de services de médiation ou d'autres mécanismes de résolution des conflits et les avantages d'y avoir recours s'ils existent. On exigerait des parents un certificat attestant de leur présence aux séances de ce programme d'éducation postséparation comme condition préalable à la présentation de leur demande d'ordonnance. Les parents ne devraient pas être obligés d'assister aux séances ensemble. (page 31)
- 11. Le Comité recommande que l'on encourage les parents qui divorcent à élaborer eux-mêmes ou avec l'aide d'un médiateur compétent ou encore par l'intermédiaire d'un autre mécanisme de résolution des conflits, une entente parentale qui détaillera les responsabilités de chacun des parents à l'égard des enfants en ce qui concerne la résidence, les soins, le processus de prise de décisions et leur sécurité financière, de même que le mécanisme de résolution des conflits auquel les parties doivent recourir. Les ententes parentales doivent aussi obliger les parents à partager entre eux les renseignements concernant la santé de l'enfant, ses études et toute autre information liée à son développement et ses activités sociales. Toutes les ordonnances parentales devraient se présenter sous la forme d'ententes parentales. (page 33)
- 12. Le Comité recommande que l'importance des relations entre les enfants et leurs grands-parents, leurs frères et soeurs et les autres membres de la famille élargie soit reconnue, et que des dispositions visant à maintenir et à encourager ces relations soient incluses dans les ententes parentales, pourvu qu'elles soient dans l'intérêt de l'enfant. (page 33)
- 13. Le Comité recommande que le ministère de la Justice cherche à modifier la *Loi sur le divorce* de manière à y exiger que les parties demandant une ordonnance parentale à un tribunal soient tenues de présenter au tribunal un projet d'entente parentale. (page 33)
- 14. Le Comité recommande que les parents qui divorcent soient encouragés à assister à au moins une séance de médiation afin de les aider à élaborer une entente parentale pour leurs enfants. En raison de l'impact de la violence familiale sur les enfants, il y aurait lieu de structurer la médiation et les autres mécanismes décisionnels hors-instance de telle sorte qu'on puisse y déceler et identifier les cas de violence familiale. Lorsque, dans une famille, il y a des antécédents évidents de violence d'un parent envers l'autre ou envers les enfants, on ne devrait utiliser d'autres mécanismes de résolution des conflits pour élaborer une entente parentale qu'une fois assurée la sécurité de la victime de la violence et éliminé le risque de violence. Dans ce cas, l'entente parentale doit être axée sur les responsabilités des parents à l'égard des enfants et comporter des mesures précises pour garantir la sécurité et la protection des parents et des enfants. (page 35)

- 15. Le Comité recommande que la *Loi sur le divorce* soit modifiée de façon à ce que les décisions relatives à l'exercice des responsabilités parentales prises en vertu des articles 16 et 17 soient prises en fonction de « l'intérêt supérieur de l'enfant ». (page 49)
- 16. Le Comité recommande que ceux qui prennent les décisions, parents et juges compris, déterminent l'« intérêt supérieur de l'enfant » à l'aide d'une liste de critères et que cette liste comprennent les éléments suivants : (page 49)
 - 16.1 La solidité, la nature et la stabilité des relations qui existent entre l'enfant et les personnes habilitées à exercer des responsabilités parentales à son égard ou à demander une ordonnance en ce sens;
 - 16.2 La solidité, la nature et la stabilité des relations qui existent entre l'enfant et les autres membres de sa famille qui habitent avec lui, d'une part, et les personnes qui s'occupent de lui et de son éducation, d'autre part;
 - 16.3 Les points de vue de l'enfant, lorsqu'ils peuvent être raisonnablement définis;
 - 16.4 La capacité et la volonté de chaque demandeur d'ordonnance de pourvoir à l'éducation de l'enfant, à son développement, aux nécessités de sa vie et à ses besoins spéciaux;
 - 16.5 Les liens culturels et la religion de l'enfant;
 - 16.6 L'importance et l'avantage pour l'enfant de la responsabilité parentale partagée, permettant aux deux parents de demeurer activement présents dans sa vie après la séparation;
 - 16.7 L'importance des rapports entre l'enfant, ses frères et soeurs, ses grands-parents et les autres membres de la famille élargie;
 - 16.8 Les ententes parentales proposées par les parents;
 - 16.9 La capacité pour l'enfant de s'adapter aux ententes parentales proposées;
 - 16.10 La volonté et la capacité de chacune des parties de faciliter et d'encourager une relation étroite et continue entre l'enfant et l'autre parent;
 - 16.11 Tout antécédent prouvé de violence familiale perpétrée par la partie réclamant une ordonnance parentale;
 - 16.12 Aucun des deux parents ne doit bénéficier d'un traitement de faveur fondé uniquement sur son sexe:
 - 16.13 La volonté démontrée par chaque parent d'assister aux séances prescrites d'éducation parentale.
 - 16.14 Tout autre facteur jugé pertinent par le tribunal dans un conflit donné relatif à l'exercice du rôle parental partagé.
- 17. Le Comité recommande de modifier la *Loi sur le divorce* de manière à ce que les parties aux procédures engagées aux termes de la *Loi sur le divorce* puissent opter pour que ces dernières se déroulent dans l'une ou l'autre des langues officielles du Canada. (page 51)

- 18. Puisque la loi oblige le gouvernement fédéral à revoir les Lignes directrices fédérales sur les pensions alimentaires dans les cinq ans suivant leur entrée en vigueur, le Comité recommande que le ministre de la Justice en effectue dans les meilleurs délais un examen approfondi pour veiller à ce qu'elles reflètent le principe de l'égalité des sexes et le droit de l'enfant au soutien financier des deux parents, et à ce qu'elles tiennent particulièrement compte des préoccupations additionnelles du Comité, à savoir (page 56):
 - 18.1 l'utilisation, dans les Lignes directrices sur les pensions alimentaires, des concepts et des termes nouveaux proposés par le Comité;
 - 18.2 les répercussions du régime fiscal actuel concernant les pensions alimentaires pour enfants, d'une part, sur le caractère adéquat des pensions alimentaires pour enfants accordées aux termes des *lignes directrices* et, d'autre part, sur l'aptitude des parents à assumer leurs autres obligations financières, par exemple envers leurs enfants issus d'une union ultérieure;
 - 18.3 l'opportunité de tenir compte des revenus des deux parents, ou de leur capacité financière, dans le calcul du montant des pensions alimentaires pour enfants, y compris de la règle des 40 % servant à déterminer si l'entente parentale constitue un « partage des responsabilités parentales »;
 - 18.4 la prise en compte des dépenses engagées par les personnes qui paient une pension alimentaire durant les périodes où elles s'occupent de leur enfant;
 - 18.5 la prise en compte des dépenses supplémentaires qu'un parent doit assumer à la suite du déménagement de l'autre parent avec l'enfant;
 - 18.6 la contribution des parents aux besoins financiers des enfants adultes qui fréquentent un établissement d'enseignement postsecondaire;
 - 18.7 la possibilité pour les parties de se soustraire par contrat à l'application des lignes directrices fédérales sur les pensions alimentaires;
 - 18.8 l'effet qu'ont les lignes directrices sur le revenu des bénéficiaires de l'aide sociale.
- 19. Le Comité recommande que le gouvernement fédéral travaille avec les provinces et les territoires à élaborer une réponse nationale coordonnée, comportant des éléments thérapeutiques et punitifs, lorsqu'il y a refus de se conformer aux ordonnances parentales. Parmi les mesures qui pourraient être envisagées, citons l'intervention précoce, un programme d'éducation parentale, une politique permettant la compensation du temps, des services d'orientation à l'intention des familles où les parents ne s'entendent pas sur l'éducation des enfants, et la médiation; dans le cas des parents intraitables, des mesures punitives pourraient être prises à l'égard de ceux qui enfreindraient illégalement les ordonnances parentales. (page 61)
- 20. Le Comité recommande que le gouvernement fédéral établisse un registre national informatisé des ordonnances de partage des responsabilités parentales. (page 61)
- 21. Le Comité recommande que les gouvernements provinciaux et territoriaux envisagent de modifier leur législation familiale de manière à ce qu'elle stipule qu'il est dans l'intérêt des enfants de maintenir et d'encourager les relations avec les grands-parents et les autres membres de la famille élargie, et que ces relations ne doivent pas être perturbées sans une raison valable liée au bien-être de l'enfant. (page 63)

- 22. Le Comité recommande que le gouvernement fédéral fasse preuve de leadership en prévoyant les budgets nécessaires, c'est-à-dire en affectant des ressources suffisantes aux mesures suivantes, considérées par le Comité comme essentielles à l'élaboration, en matière de droit de la famille, de politiques et de pratiques davantage axées sur l'intérêt des enfants (page 66):
 - 22.1 Développement de tribunaux unifiés de la famille dans l'ensemble du pays, incluant l'affectation de ressources importantes aux interventions et aux programmes visant à assurer le respect des ordonnances parentales, tels les programmes d'intervention précoce, l'éducation parentale, les politiques permettant la compensation du temps, les services d'orientation aux familles et aux enfants, et les services de médiation;
 - Accès à l'aide juridique en matière civile afin que l'absence ou l'insuffisance de l'aide juridique ne soit pas préjudiciable aux parties visées par les demandes contestées d'ordonnances parentales;
 - 22.3 Création d'un poste de « commissaire à la défense de l'enfant » qui relèverait du Parlement et dont le titulaire serait chargé de veiller au bien-être et aux intérêts des enfants dans le cadre de l'application de la *Loi sur le divorce* et dans d'autres domaines de compétence fédérale, ainsi que de les promouvoir;
 - 22.4 Prestation des services d'un avocat chargé de représenter l'enfant, lorsqu'un juge en a décidé ainsi;
 - 22.5 Élaboration de programmes d'éducation parentale;
 - 22.6 Création de programmes de visites surveillées;
 - 22.7 Pour les juges, de meilleures possibilités de perfectionnement professionnel, ce dernier étant orienté sur le principe du partage des responsabilités parentales énoncé par le Comité, l'impact du divorce sur les enfants et l'importance de préserver les rapports entre les enfants et leurs parents et les membres de la famille élargie.
- 23. Le Comité recommande que le gouvernement fédéral continue de travailler avec les provinces et les territoires afin d'accélérer l'établissement de tribunaux unifiés de la famille ou de tribunaux semblables dans tous les districts judiciaires du Canada. (page 70)
- 24. Le Comité recommande que, en plus d'exercer leur fonction juridictionnelle, les tribunaux unifiés de la famille offrent divers services de soutien hors-instance pouvant inclure les suivants (page 70) :
 - 24.1 conseil aux familles et aux enfants;
 - 24.2 éducation juridique publique;
 - 24.3 évaluation du rôle des parents et services de médiation;
 - 24.4 un service qui aurait pour fonction d'entendre et d'aider les enfants qui éprouvent des difficultés à la suite de la séparation ou du divorce de leurs parents;
 - 24.5 des services de gestion de cas qui veillent à l'application des ordonnances de responsabilité parentale partagée.

- 25. Le Comité recommande que, dans la mesure du possible, les autorités provinciales et territoriales, les barreaux et les administrateurs des tribunaux s'efforcent de privilégier, parmi toutes les affaires qui ressortissent au droit de la famille, celles qui concernent les demandes de responsabilité parentale partagée. (page 71)
- 26. Le Comité recommande que, pour les questions concernant l'exercice des responsabilités parentales aux termes de la *Loi sur le divorce*, on reconnaisse et on fasse valoir l'importance de la présence des deux parties lors de toutes les procédures, et que l'on évite dans la mesure du possible les procédures *ex parte*. (page 71)
- 27. Le Comité recommande que les ordonnances de responsabilité parentale partagée soient plus détaillées et plus faciles à lire et à comprendre pour les agents de police chargés de les exécuter. (page 74)
- 28. Le Comité recommande que les provinces et les territoires cherchent de nouveaux moyens de sensibiliser le public à l'impact du divorce sur les enfants et, en particulier, à certains aspects des comportements des parents qui nuisent le plus aux enfants lors de la dissolution du mariage, et que ces programmes d'éducation soient mis en application. Dans la mesure du possible, le Comité recommande que le gouvernement fédéral contribue à un tel effort dans les limites de sa compétence et qu'il en assure en partie le financement. (page 75)
- 29. Le Comité recommande que le gouvernement fédéral étende son soutien financier à des programmes communautaires visant des couples qui cherchent à éviter la séparation ou le divorce, ou à renforcer leur union. (page 75)
- 30. Le Comité recommande que la *Loi sur le divorce* soit modifiée pour exiger a) qu'un parent souhaitant déménager avec un enfant à une distance qui exigerait que soient changées les ententes parentales ordonnées par le tribunal en demande l'autorisation à la cour au moins 90 jours avant le déménagement prévu et b) qu'un préavis soit donné au même moment à l'autre parent. (page 78)
- 31. Le Comité recommande que les provinces et les territoires de même que les associations professionnelles compétentes élaborent des normes d'accréditation s'appliquant aux médiateurs familiaux, aux travailleurs sociaux et aux psychologues qui font les évaluations des cas de responsabilité parentale partagée. (page 80)
- 32. Le Comité recommande que les gouvernements fédéral, provinciaux et territoriaux unissent leurs efforts pour favoriser l'établissement de modèles efficaces pour dépister rapidement les séparations très conflictuelles. Les familles en cause devraient recevoir rapidement une aide spécialisée et avoir accès à des services destinés à améliorer le sort des enfants. (page 82)
- 33. Le Comité recommande que les professionnels qui rencontrent des enfants dont les parents se séparent soient conscients que le refus d'un enfant d'avoir des contacts avec l'un de ses parents peut être le signe d'un problème grave et justifie l'acheminement immédiat de la famille vers une intervention thérapeutique. (page 83)
- 34. Le Comité recommande que les autorités fédérales, provinciales et territoriales collaborent pour faire en sorte qu'il y ait des programmes d'exercice supervisé des responsabilités parentales partout au Canada. (page 84)

- 35. Le Comité recommande de modifier la *Loi sur le divorce* pour y ajouter une disposition explicite autorisant le tribunal à rendre une ordonnance d'exercice supervisé des responsabilités parentales si nécessaire, afin de permettre à un parent de continuer à voir son enfant dans des situations de transition ou lorsque les circonstances indiquent clairement que l'enfant a besoin de protection. (page 84)
- 36. Le Comité recommande que les autorités provinciales et territoriales obligent les sociétés d'aide à l'enfance à communiquer leurs dossiers d'enquête aux personnes chargées par le tribunal d'évaluer les familles qui sont soumises à de telles enquêtes. (page 86)
- 37. Le Comité recommande que les procureurs généraux du Canada et des provinces travaillent de concert avec les forces policières et les organismes policiers pour que tous les mandats délivrés dans les affaires d'enlèvement d'enfants stipulent clairement que leur portée et leur application sont nationales. (page 93)
- 38. Le Comité recommande que le procureur général du Canada travaille à élaborer une réponse nationale concertée au problème de l'enlèvement d'enfants au Canada. (page 93)
- 39. Le Comité recommande que le retrait unilatéral d'un enfant du foyer familial sans que des arrangements convenables aient été pris pour maintenir un contact avec l'autre parent soit reconnu contraire à l'« intérêt supérieur de l'enfant », sauf dans les situations d'urgence. (page 93)
- 40. Le Comité recommande qu'un parent qui procède au retrait unilatéral d'un enfant du foyer familial ne soit pas autorisé à invoquer la période pendant laquelle il a assumé la garde et la surveillance exclusives de l'enfant à la suite du retrait, quelle qu'en soit la durée, comme argument pour obtenir une ordonnance parentale exclusive. (page 94)
- 41. Le Comité recommande que le gouvernement fédéral donne suite aux recommandations du Sous-comité des droits de la personne et du Comité permanent des affaires étrangères et du commerce international de la Chambre des communes, recommandations qui figurent dans le rapport intitulé *L'enlèvement international d'enfants : solutions de rechange.* (page 94)
- 42. Le Comité recommande que le ministre des Affaires étrangères et le Bureau des passeports continuent à chercher de nouvelles façons d'améliorer l'identification des enfants mineurs sur les documents de voyage, et qu'ils continuent de se pencher sur la possibilité d'exiger que chaque enfant ait son propre passeport. (page 94)
- 43. Le Comité recommande que, pour contrer les fausses accusations intentionnelles de mauvais traitement et de négligence, le gouvernement fédéral évalue les dispositions du *Code criminel* relatives aux fausses déclarations dans les affaires relevant du droit de la famille, et qu'il élabore des politiques d'intervention dans les cas où, de toute évidence, il y a eu méfait, entrave à la justice ou parjure. (page 100)
- 44. Le Comité recommande que le gouvernement fédéral travaille de concert avec les gouvernements provinciaux et territoriaux pour inciter les organismes de protection de l'enfance à donner suite aux enquêtes sur les allégations de mauvais traitements faites dans le cadre de différends sur la responsabilité parentale, afin d'établir des statistiques qui permettront de mieux comprendre ce problème. (page 103)
- 45. Le Comité recommande que le gouvernement fédéral poursuive ses consultations auprès des collectivités et des organisations autochtones partout au Canada sur les questions concernant le partage des responsabilités parentales qui sont particulières à ces collectivités afin d'élaborer un plan d'action clair qui sera mis en oeuvre en temps utile. (page 108)

- 46. Le Comité recommande que le gouvernement fédéral se serve, comme base pour ces consultations, des recommandations touchant le droit de la famille formulées par la Commission royale sur les peuples autochtones, et qu'il travaille à leur mise en oeuvre en fonction des besoins. (page 108)
- 47. Le Comité recommande que l'orientation sexuelle ne soit pas considérée comme un élément négatif dans les décisions relatives au partage des responsabilités parentales. (page 110)
- 48. Le Comité recommande que le ministre des Affaires étrangères cherche à faire ratifier le plus tôt possible la Convention de La Haye concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants, signée en 1996. (page 111)

Les enfants dont les parents divorcent vivent une restructuration complète du foyer. Les fondements mêmes de leur existence chavirent, et bon nombre d'entre eux sont ensuite défavorisés sur les plans économique, social et émotif, parfois pour le reste de leur vie. Les parlementaires ont pris connaissance en 1996 et 1997 de l'importance croissante qu'accorde la population à cette question. Lorsque le Parlement a étudié le projet de loi C-41, qui a modifié la *Loi sur le divorce* et créé des Lignes directrices sur les pensions alimentaires pour enfants d'application obligatoire, de nombreux témoins ont présenté des exemples convaincants de l'insuffisance des mécanismes dont dispose le système judiciaire pour traiter des questions de garde et de droit de visite ou des ententes parentales suite à un divorce.

Particulièrement lorsque le projet de loi a été renvoyé au Comité sénatorial permanent des affaires sociales, des sciences et de la technologie, des sénateurs tels que Duncan Jessiman, Anne Cools et Mabel DeWare, présidente du Comité, se sont assurés qu'on tienne compte des préoccupations dont leur ont fait part les témoins. Trop de témoins ont exhorté le Comité sénatorial à tenir compte de leur crainte, concernant la garde et le droit de visite, de voir le Sénat adopter le projet de loi sans s'être assuré auparavant de l'engagement du gouvernement fédéral à étudier également ces questions. Selon l'entente intervenue entre le Comité sénatorial et l'hon. Allan Rock, ministre de la Justice à l'époque, un comité parlementaire composé de sénateurs et de députés a été mis sur pied pour étudier les questions touchant aux enfants dont les parents divorcent et pour trouver de meilleures façons d'améliorer le sort de ces jeunes.

Le Comité mixte spécial sur la garde et le droit de visite des enfants s'est réuni pour la première fois en décembre 1997 afin de déterminer les points principaux à étudier concernant les arrangements parentaux après un divorce. L'ordre de renvoi du Comité, qui a commencé ses audiences publiques en février 1998, prévoit notamment les objectifs suivants :

Que soit formé un comité mixte spécial du Sénat et de la Chambre des communes chargé d'examiner et d'analyser les questions des ententes concernant la garde, les droits de visite et l'éducation des enfants après la séparation ou le divorce des parents. Plus particulièrement, que le comité mixte soit chargé d'évaluer le besoin d'une approche davantage centrée sur les enfants dans l'élaboration des politiques et des pratiques du gouvernement en droit de la famille, c'est-à-dire une approche qui mette l'accent sur les responsabilités de chaque parent et sur les besoins des enfants et leur meilleur intérêt, au moment de la conclusion des ententes concernant l'éducation des enfants.

Députés et sénateurs représentant tous les partis politiques se sont mis à la tâche, touchés par la souffrance de nombreux témoins et de leurs enfants, qui ont eu le courage de faire part ouvertement au Comité de leur drame personnel. Les membres ont été particulièrement émus par les témoignages livrés par les quelques enfants et jeunes adultes qui ont participé aux audiences. La plupart des membres du Comité ont une expérience personnelle ou professionnelle du divorce et étaient donc en partie préparés à recevoir les témoignages. Néanmoins ils ont été bouleversés par les histoires déchirantes de plus de 500 témoins — enfants et parents — qui partout au Canada ont participé aux 39 audiences publiques, dont certaines furent fort longues.

Le Comité a établi dès le début de l'étude que son approche serait aussi ouverte que possible. Aucun effort n'a été ménagé pour accommoder tous les citoyens et groupes qui demandaient à comparaître comme témoins et, même si autant de collectivités et d'organismes professionnels que possible ont été invités à

témoigner, il a été impossible d'entendre tout le monde à cause du très grand nombre de citoyens désireux de participer. Dans chaque ville où il s'est rendu, qu'il s'agisse de Vancouver, d'Edmonton, de Calgary, de Regina, de Winnipeg, de Toronto, de Montréal, de Fredericton, de Charlottetown, d'Halifax, de St. John's ou d'Ottawa, le Comité a entendu au moins un échantillon de citoyens qui avaient demandé à témoigner. Le Comité aurait aimé se déplacer davantage, mais il en a été empêché faute de temps et de moyens financiers. Les témoins ont exprimé une grande diversité d'opinions; on comptait parmi eux des parents, des organisations de pères, des groupes de femmes et des professionnels, dont des avocats, des juges, des travailleurs sociaux, des psychologues, des médecins, etc.

Bien entendu, les personnes qui ont réglé le divorce à l'amiable étaient sous représentées parmi les particuliers qui ont demandé à comparaître. Les membres du Comité sont bien conscients qu'en raison de la nature de l'étude, les personnes mécontentes du processus de divorce ont été les plus motivées à témoigner. Certains exposés ne reflètent donc pas le point de vue de tous les parents divorcés. C'est pourquoi les membres du Comité ont été prudents de ne pas se borner à des solutions visant les cas exceptionnels ou les situations les pires. Néanmoins, ils reconnaissent l'importance des témoignages douloureux entendus. Il est clair qu'il faut absolument revoir en profondeur la manière dont sont pris les arrangements parentaux après une séparation ou un divorce.

La plupart des témoins ont souligné l'importance sur la vie des enfants des décisions touchant la garde et les droits de visite — terminologie courante en matière d'ententes parentales après le divorce — pour la vie de leurs enfants. Un certain nombre établissent même un lien entre leurs difficultés actuelles et la souffrance qu'ils ont vécue enfant lors du divorce de leurs propres parents. Comme l'a précisé Nick Bala, professeur de droit à l'Université Queen's :

Les problèmes qui surgissent influent sur la vie de l'enfant non seulement dans l'immédiat, à l'étape de l'enfance, mais tout au long de l'adolescence et même de la vie adulte. (Réunion 6)

Les témoins ayant comparu devant le Comité, précisent que la plupart des couples divorcent sans recourir à l'appareil judiciaire ou en faisant, tout au plus, appel à un avocat pour les aider à la négociation ou à une ou deux motions provisoires. Ils s'adressent rarement aux tribunaux pour les décisions touchant la garde et les droits de visite. Les témoins estiment qu'entre 10 à 20 p. 100 des couples qui divorcent entament des poursuites, mais ils ne sauraient dire si c'est parce qu'un grand nombre d'ententes sont conclues à l'amiable ou parce que le père ou la mère hésite à s'engager dans un procès qui risque d'être coûteux et futile puisque la décision favorisera sans doute l'autre parent. Toutefois, tout le monde semble unanime à penser que même utilisés en dernier recours, les tribunaux ne sont pas un endroit propice pour décider du partage des responsabilités parentales.

C'est presque un truisme de dire que le divorce est, par définition, un processus pénible et douloureux. Lorsqu'il donne lieu à des demandes judiciaires entre les parents, ce processus devient encore plus douloureux. Le cadre juridique actuel, à savoir le processus accusatoire utilisé pour attribuer la garde et les droits de visite, est tout à fait inadapté aux besoins des enfants et il leur est en fait extrêmement préjudiciable. (Ian Solloway, avocat, réunion 15, Montréal)

Les membres du Comité conviennent que toute animosité entre parents n'est pas dans l'intérêt des enfants et nuit à l'orientation même que le Comité a voulu donner à ses travaux, puisqu'elle met l'accent sur les adultes et leurs préoccupations. Cerise Morris, psychothérapeute à Montréal, a exprimé une inquiétude que partage le Comité:

Certains groupes de revendication féministes soutiennent que les droits des pères l'emportent systématiquement dans les litiges portant sur la garde et les visites dans le système juridique canadien, ce qui perpétue l'inégalité des femmes et expose même certaines femmes et certains

enfants aux mauvais traitements d'ex-conjoints violents. Certaines porte-parole des femmes défendent la pratique qui consiste à interdire l'accès aux enfants pour protester contre le retard ou le non-versement de la pension alimentaire pour les enfants due par les pères.[...] Des groupes de revendication communément appelés «groupes pour la défense des droits des hommes» allèguent que les décisions rendues en matière de garde favorisent injustement les femmes et que le système de justice les autorise arbitrairement et injustement à priver les pères d'un accès suffisant à leurs enfants, sinon de tout accès, même lorsqu'ils respectent leurs obligations parentales et financières. Bien sûr, il peut y avoir du vrai dans ce que disent les deux camps, mais le danger, d'après moi, c'est que ce domaine du droit de la famille devienne le champ de bataille de la guerre des sexes. (réunion 16, Montréal)

Chargé d'étudier la situation des enfants touchés par un divorce plutôt que celle des parents, le Comité a été mandaté d'apprendre tout ce qu'il pouvait sur : les tendances en matière de divorce au Canada à la fin du XX^e siècle, l'incidence du divorce sur le développement et la santé psychologique des enfants, l'éventail des mécanismes juridiques et autres pouvant aider à prendre des décisions sur la garde et le droit de visite qui sont dans l'intérêt des enfants et la possibilité d'améliorer le sort de ces derniers. Les membres du Comité ont donc voulu tout d'abord établir clairement la fréquence des divorces au Canada et le nombre d'enfants touchés.

Selon Statistique Canada, il y a eu 78 880 divorces au Canada en 1994 et 77 636 en 1995¹ et, chaque, année plus de 47 000 enfants ont fait l'objet d'une ordonnance de garde². Le taux de divorce n'a cessé d'augmenter au Canada depuis 1968, date à laquelle ont été adoptées les premières dispositions législatives fédérales en matière de divorce. Il a atteint un sommet tout de suite après les modifications apportées en 1985 à la *Loi sur le divorce*, qui ont introduit l'échec du mariage comme motif suffisant de divorce, la plupart du temps après une séparation d'au moins un an. L'adultère et la cruauté physique ou mentale figurent toujours dans la Loi comme motifs de divorce avec attribution de responsabilité, mais 1985 a marqué au Canada le début du divorce sans faute. Adrienne Snow, coordonnatrice des politiques à la Fondation nationale de recherche et d'éducation de la famille, a décrit cette tendance :

Ironiquement, la loi favorisant le divorce sans faute, comme vous le savez, visait à réduire les taux de divortialité et à soulager les procédures de divorce de toute acrimonie. Mais au Canada les chiffres sont consternants. Avant la réforme de la *Loi sur le divorce* en 1968, le taux de divortialité se situait à 8 p. 100. En 1987, soit un an après l'introduction du divorce sans faute, ce chiffre avait grimpé jusqu'à 44 p. 100. L'an dernier, il est retombé à un taux plus stable d'environ 40 p. 100, selon l'Institut Vanier de la famille d'Ottawa. (Réunion 36)

L'augmentation du nombre de divorces a entraîné une diversification du mode de vie des enfants. La plupart des Canadiens continuent à vivre en milieu familial, mais celui-ci prend des formes de plus en plus diverses.

Selon les données du recensement de 1996, 84 p. 100 des Canadiens en 1996 vivaient en milieu familial. Les couples mariés avec enfants constituaient 45 p.100 de toutes les familles, les couples mariés sans enfants, 29 p. 100, les familles monoparentales, 15 p. 100, les couples de fait avec enfants, 6 p. 100 et les couples de fait sans enfants, les 6 p. 100 restants. [...] En 1996, 15 p. 100, de tous les enfants de moins de 17 ans vivaient dans une famille monoparentale dirigée par une femme, contre 2 p. 100 dans une famille dirigée par un homme. (Jim Sturrock, recherchiste, ministère de la Justice, réunion 3)

Il est souvent difficile d'obtenir des données pancanadiennes sur le droit de la famille. Par conséquent, bon nombre des grandes questions que se posait le Comité sur le droit de famille et les ententes parentales sont

Statistique Canada, Divorces, 1995, nº 84-213-XPB au catalogue, Ottawa, p. 3.

Bien entendu, de nombreux autres enfants dont les parents n'étaient pas mariés ou n'ont pas demandé le divorce ont aussi vu leurs parents se séparer au cours de la même période.

restées sans réponse. Les données sur le divorce viennent principalement du Bureau d'enregistrement des actions en divorce, lieu de dépôt de l'information sur les conclusions présentées lors des causes de divorce. Son rôle principal est de contrôler le début des procédures afin de s'assurer que ne sont pas menées simultanément deux poursuites touchant les deux mêmes personnes. Il ne peut recueillir que l'information qui figure sur le dessus des documents de divorce. Les données qui émanent du Bureau ne donnent donc aucune indication sur les ententes informelles, les nouveaux arrangements, les modifications d'ordonnances ou autres faits importants. Joe Hornick, directeur exécutif de l'Institut canadien de recherche sur le droit et la famille, a prévenu le Comité de

la difficulté de revoir les lois et de faire des propositions de réforme juridique de la Loi sur le divorce sans disposer des résultats d'une recherche empirique de qualité. En l'absence de preuves ou de témoignages objectifs et de qualité, nos décisions se fondent trop souvent sur l'expérience historique — anecdotique et personnelle. (Réunion 20, Calgary)

Les témoins ont convenu que dans la grande majorité des cas, les deux parties s'entendent habituellement pour confier la garde des enfants à la mère. Selon de nombreux témoins, cette tendance reflète fidèlement le partage des responsabilités à l'égard des enfants dans les foyers intacts et découle de la volonté des parents de poursuivre la situation établie par entente avant le divorce ou d'agir dans l'intérêt de l'enfant. Plusieurs témoins estiment toutefois que certains hommes ont peut-être tendance à accepter de telles dispositions parce qu'ils jugent peu probable qu'une entente ou un tribunal leur accorde la garde des enfants. D'après le rapport de 1995 de Statistique Canada sur le divorce, 11 p. 100 des enfants à charge ont été confiés à la garde du père, 68 p. 100 à la mère et 21 p. 100 font l'objet d'une garde partagée³. Ces données comprennent les cas où des ententes consensuelles ont été avalisées par la cour ainsi que les cas où les dispositions ont été ordonnées par un tribunal. Sont exclues les ententes qui n'ont pas été officialisées par un tribunal.

Cependant, les données de 1995 de Statistique Canada sur la garde partagée indiquent probablement une proportion plus élevée d'enfants en situation de garde partagée qu'il n'en existe en réalité puisqu'elles reflètent seulement l'attribution officielle de la garde, c'est-à-dire les cas où les parties ou le tribunal ont indiqué que la garde serait partagée. Ces cas ne représentent pas toujours des situations où la garde physique des enfants est partagée également entre le père et la mère. En fait, le nombre d'enfants en situation de garde partagée qui passent sensiblement le même temps avec chacun des deux parents est beaucoup moins élevé que ce que donnent les données de 1995. Comme l'a rapporté Statistique Canada le 2 juin 1998 lors de la publication des plus récentes données de l'Enquête longitudinale nationale sur les enfants et la jeunesse, « [1]a plupart des enfants (86 p. 100) vivaient avec leur mère après la séparation de leurs parents. Seulement 7 p. 100 d'entre eux vivaient avec leur père, tandis qu'il y avait garde partagée dans environ 6 p. 100 des cas. Un autre type d'entente était en vigueur dans les autres cas (moins de 1 p. 100) »⁴. Ce nombre représente plus exactement la proportion d'enfants qui vivent une garde physique partagée également. Comme l'a souligné Denise Côté, travailleuse sociale, qui a effectué une étude sur la garde partagée au Québec :

[O]n ne peut se fier aux statistiques que nous fournit Statistique Canada au sujet de la garde conjointe. Les statistiques qu'on nous donne sont celles des ententes devant les cours et elles ne correspondent pas à ce qui se passe dans la vraie vie. [...] Je puis toutefois dire qu'à l'heure actuelle, dans environ 5 à 7 p. 100 des cas, il y a garde physique partagée. Ce sont des chiffres très restreints, qui varient selon différentes études. Ils ne dépassent jamais 10 p. 100. (Réunion 16, Montréal)

Statistique Canada, Divorces, 1995, p. 21.

Statistique Canada, Le Quotidien, 2 juin 1998, disponible en ligne à http://www.statcan.ca/Daily/Francais/980602/q980602.htm

Une autre constatation importante qui ressort des plus récentes données de l'Enquête longitudinale nationale est le fait que, de plus en plus, les enfants sont susceptibles de vivre plus jeune la séparation de leurs parents. « Un enfant sur cinq nés en 1987 ou 1988 a vu ses parents se séparer avant qu'il n'ait atteint l'âge de 5 ans. Cette proportion n'a été atteinte qu'à 16 ans chez les enfants nés entre 1961 et 1963. » (Yvan Clermont, Statistique Canada, réunion 35). Ce fait aura nécessairement des répercussions sur notre compréhension de l'incidence du divorce sur le développement de ces enfants ainsi que sur les interventions thérapeutiques et autres que notre société doit adopter pour améliorer le sort de ces jeunes.

Le Comité a constaté au cours de l'étude qu'il était sans doute nécessaire de respecter le partage constitutionnel des pouvoirs législatifs dans le domaine du droit de la famille, mais qu'il importe encore davantage d'adopter des initiatives coordonnées ou plurijuridictionnelles afin de résoudre bon nombre de problèmes soulignés. En fait, l'on sait depuis longtemps que le droit de la famille au Canada est un domaine de compétence partagée, et même si le Parlement fédéral est le seul habilité à légiférer en matière de divorce, la plupart des initiatives du droit de la famille relève d'une coordination fédérale-provinciale-territoriale. C'est d'ailleurs à cette fin que les gouvernements ont créé le Comité fédéral-provincial-territorial du droit de la famille. Aussi, lorsqu'il a formulé bon nombre de ses recommandations touchant la réforme du droit et d'autres questions, le Comité a tenu compte de ce partage fédéral provincial des compétences et de l'utilité d'amorcer les réformes à plusieurs niveaux, de façon coordonnée.

Selon le constitutionnaliste Peter Hogg, le droit de la famille relève principalement de la compétence provinciale, sauf pour ce qui est du pouvoir fédéral exclusif touchant « le mariage et le divorce »⁵. Le pouvoir en matière de divorce s'étend aux mesures accessoires qui en découlent, notamment les pensions et les questions de garde et de droit de visite. Ce pouvoir fédéral admet qu'« il est nécessaire de reconnaître les mariages et les divorces à l'échelle du pays »⁶. Les assemblées législatives provinciales tirent leur compétence des pouvoirs liés à « La propriété et les droits civils dans la province »⁷ qui comprennent le droit des biens, le droit civil et le droit des contrats. Elles ont également compétence dans les domaines suivants : les biens matrimoniaux, l'adoption, l'exécution de la pension alimentaire, l'établissement de la paternité, le changement de nom, la protection des enfants et, dans les situations où l'on ne demande pas un divorce, la pension alimentaire au titre de l'enfant et du conjoint ainsi que la garde et l'accès.

⁵ Loi constitutionnelle de 1867, paragraphe 91(26), cité dans Peter W. Hogg, Constitutional Law in Canada, 4e édition (Scarborough: Carswell, 1997) p. 26-1.

⁶ Ibid., p. 26-2.

⁷ Loi constitutionnelle de 1867, paragraphe 92(13).



Chapitre 1 : La famille et le divorce

Je me suis dis : « Comment est-ce possible? Pourquoi moi? » J'ai posé la question à ma mère qui m'a répondu : « Parce que la vie n'est pas juste. » (Témoin de 12 ans)

Très peu d'enfants canadiens savent que la *Loi sur le divorce* existe, et pourtant elle influe directement sur l'existence de dizaines de milliers d'entre eux chaque année. La plupart savent que les divorces existent mais, contrairement aux adultes, ils prennent pour acquis que leur famille ne sera jamais touchée. C'est pourquoi, quand survient un divorce, leur vie est à jamais transformée.

Le tribunal compétent peut, sur demande de l'un des époux ou des deux, lui ou leur accorder le divorce pour cause d'échec du mariage. *Loi sur le divorce*, paragraphe 8(1).

Le tribunal compétent peut, sur demande des époux ou de l'un d'eux ou de toute autre personne, rendre une ordonnance relative soit à la garde des enfants à charge ou de l'un d'eux, soit à l'accès auprès de ces enfants, soit aux deux. *Loi sur le divorce*, paragraphe 16(1).

En rendant une ordonnance conformément au présent article, le tribunal ne tient compte que de l'intérêt de l'enfant à charge du mariage, défini en fonction de ses ressources, de ses besoins et, d'une façon générale, de sa situation. *Loi sur le divorce*, paragraphe 16(8).

En rendant une ordonnance conformément au présent article, le tribunal applique le principe selon lequel l'enfant à charge doit avoir avec chaque époux le plus de contact compatible avec son propre intérêt et, à cette fin, tient compte du fait que la personne pour qui la garde est demandée est disposée ou non à faciliter ce contact. *Loi sur le divorce*, paragraphe 16(10).

Ces quatre paragraphes succincts de la *Loi sur le divorce* du Canada ont chaque année une profonde influence sur la vie des enfants. Ces dispositions législatives fournissent à de nombreux couples une manière simple et efficace de mettre fin à une relation qui ne répond plus à leurs attentes ou à celle de l'un des partenaires. Le Comité et les témoins ont étudié ces dispositions afin de trouver un moyen de les modifier de manière à réduire toute incidence négative sur la famille et les enfants et à améliorer le sort des membres de la famille.

Quand le Comité mixte spécial sur la garde et le droit de visite des enfants a commencé ses travaux, il ne s'est pas contenté d'un examen législatif. Il a aussi été chargé d'évaluer la nécessité d'une approche davantage axée sur les enfants dans l'élaboration des politiques en droit de la famille, c'est-à-dire une approche qui mette l'accent sur l'exercice conjoint des responsabilités parentales et sur des ententes parentales conclues dans l'intérêt des enfants et répondant aux besoins de ces derniers.

Les tribunaux peuvent aider à régler les questions comme la garde et tout ça, mais ils ne peuvent pas nous aider avec nos émotions. (Témoin de 12 ans)

Le Comité a entendu des enfants décrire les effets du divorce sur leur vie. Ces enfants, qui se sont présentés seuls ou en groupe, ont expliqué la souffrance et les bouleversements causés par le divorce de leurs parents. Ils ont parlé de leurs craintes et de leurs inquiétudes, de leur sentiment de perte et de l'impression d'être exclus d'un processus judiciaire qui pourtant influe directement sur leur vie. Ces enfants veulent que soit modifiée la manière dont leurs parents et les tribunaux prennent des décisions qui les affectent. Les enfants et les jeunes adultes qui ont témoigné ont insisté sur la nécessité d'avoir plus de mécanismes tant

officiels que non officiels leur permettant de participer à la prise des décisions concernant les ententes parentales. Les enfants qui ont fait part au Comité de leurs expériences positives sont généralement ceux pour lesquels l'entente conclue après la séparation ne limitait pas leurs rapports avec les deux parents et leur permettait de prendre eux-mêmes de nombreuses décisions au sujet du calendrier des visites.

A. Données concernant les enfants et le divorce

En raison du taux de divorces élevé, plus de 47 000 enfants ont fait l'objet, en 1994 et 1995, d'ordonnances de garde rendues en vertu de la *Loi sur le divorce*⁸. Par conséquent, un grand nombre d'enfants vivent un changement de leur mode de vie au foyer⁹. Le remariage des parents ou la formation de nouvelles relations après le divorce compliquent en plus la vie de ces enfants¹⁰. Environ 75 p. 100 des hommes et des femmes divorcés se remarient, et les enfants du premier mariage doivent parfois établir des relations avec des beaux-parents. En 1992, 13 p. 100 des divorces marquaient l'échec d'un deuxième mariage¹¹.

Le professeur James Richardson de l'Université du Nouveau-Brunswick, qui a comparu lors d'une réunion à Fredericton, a examiné certaines des raisons qui expliquent l'augmentation du nombre de divorces et a conclu que notre attitude à l'égard du mariage a beaucoup changé au cours des dernières années. Tout d'abord les gens ne se sentent plus obligés de se marier, de rester mariés ou d'avoir des enfants pour se conformer aux attentes de la collectivité. De plus « ils tiennent pour acquis qu'ils se marieront par amour et pour une satisfaction affective plutôt que pour des raisons économiques ou pratiques ». Enfin, « plus de personnes que par le passé fondent leur mariage sur des considérations émotionnelles et non purement financières ». ¹²

Bien que le taux de divorce augmente, M. Richardson signale que la plupart des divorces se font sans qu'il y ait de conflit majeur sur le partage des responsabilités parentales. Citant une étude de 1990 du ministère de la Justice, M. Richardson précise qu'au Canada,

au-delà de 90 p. 100 des divorces sont maintenant accordés sans audience officielle devant un tribunal. Puisque seuls les divorces sans contestation peuvent être traités de cette façon, il est clair que, contrairement à la croyance populaire et à l'image qu'en donnent les médias, les divorces se déroulent pour la plupart sans de longs et pénibles conflits au sujet de la garde et des biens. Les évaluations révèlent en fait que moins de 5 p. 100 des divorces donnent lieu à une contestation telle que l'affaire doit être portée en cours. Or dans ces cas, les litiges touchent plus souvent la pension alimentaire au titre du conjoint ou de l'enfant et la division de propriété que la

Statistique Canada, Divorce 1995, p. 2.

⁹ Statistique Canada, Enquête longitudinale sur les enfants et les jeunes.

D'autres pays commencent aussi à s'inquiéter du taux élevé de divorces chez eux. Les États-Unis ont terminé en 1996 une étude nationale, intitulée *Parenting Our Children: In the Best Interests of the Nation* (Washington, septembre 1996), semblable à celle qu'effectue le Comité mixte spécial. Selon cette étude, 1 005 000 enfants aux États-Unis ont vu leurs parents divorcer en 1990. Si l'on ajoute à ces enfants ceux qui sont nés de parents non mariés, on constate que plus de la moitié de tous les enfants vivront à un moment ou à un autre dans un foyer comptant un seul parent. Le rapport s'est également attardé aux coûts économiques du divorce. Entre 1970 et 1991, seulement 9 p. 100 des familles ayant des enfants de moins de 18 ans et dirigées par un couple marié étaient pauvres, alors que 46 p. 100 des familles monoparentales dirigées par une femme et 23 p. 100 des familles dirigées par un homme étaient pauvres.

¹ C. James Richardson, « Divorce and Remarriage », dans Families: Changing Trends in Canada (Toronto: McGraw-Hill Ryerson, 1996), p. 233.

¹² Ibid.

garde de l'enfant¹³.

En dernier lieu, M. Richardson a parlé des arrangements en matière de garde :

Les faits n'indiquent pas de grand changement en ce qui concerne la garde des enfants. Apparemment, la majorité des couples qui divorcent estiment que les enfants seront mieux avec la mère, et la question n'est pas contestée officiellement. Des groupes de revendication des droits des pères ont souligné des exceptions, mais en réalité, la plupart des pères ne tiennent pas à avoir la garde des enfants ou à s'en occuper jour après jour (ou ils se font dire par leur avocat qu'ils ont peu de chance d'obtenir la garde)¹⁴.

Les affirmations de Richardson ont été contestées par bien des témoins qui ont comparu devant le Comité.

B. Les attitudes à l'égard du divorce

La plupart des Canadiens considèrent le divorce comme un droit. Les adultes choisissent librement leur conjoint et, si l'un des deux partenaires juge la relation insatisfaisante, malsaine ou dangereuse, il peut y mettre fin par un divorce. Les modifications apportées à la *Loi sur le divorce* en 1985 ont pratiquement supprimé la notion de blâme dans les causes de divorce et depuis, le Canada offre à toutes fins pratiques le divorce sans faute.

Quand le Canada, à l'instar d'autres pays, a adopté des dispositions législatives moins strictes à l'égard du divorce dans les années 60, 70 et 80, les professionnels de la santé mentale estimaient qu'il était préférable pour les enfants de grandir avec des parents divorcés que dans une famille où l'un des deux parents était malheureux. Tout en reconnaissant que le divorce est une expérience douloureuse et difficile pour tous les membres de la famille, on estimait que le divorce ne faisait pas de tort aux enfants à long terme. La documentation clinique de l'époque porte sur la nécessité de recourir au conseil préventif pour les enfants car, en leur donnant la possibilité de parler de leurs émotions, on estimait possible d'éviter plus tard les troubles émotifs.

Ainsi, dans son livre *The Boys and Girls Book about Divorce*, publié en 1970, M. Richard Gardner, connu plus récemment pour ses idées sur le syndrome de l'aliénation parentale, affirmait que l'enfant dont les parents sont pris dans un mariage malheureux sera plus susceptible de vivre des difficultés psychiatriques que celui dont les parents mal assortis ont été assez sains et assez fort pour mettre fin à leur relation insatisfaisante¹⁵.

L'hypothèse selon laquelle les enfants se portent mieux dans une famille divorcée que dans une famille intacte vivant stress et difficultés a entraîné un profond changement dans la façon dont les professionnels envisageaient le divorce. Jusque dans les années 70, le divorce était mal vu; par la suite il est devenu de plus en plus acceptable aux yeux de la société canadienne. De nombreux articles dans les revues spécialisées ont affirmé l'innocuité relative du divorce. Il était certes considéré comme une expérience stressante, mais non comme pouvant causer des troubles émotifs graves chez ceux qui l'avaient vécu. On considérait que des parents heureux, même s'ils vivaient séparément, étaient plus à même d'offrir le meilleur environnement possible à leurs enfants.

¹³ *Ibid.*, p. 231.

¹⁴ Ibid., p. 234.

Richard A. Gardner, The Boys and Girls Book about Divorce (Bantam Books, 1970) p. xix.

En fait, bon nombre voyaient dans le divorce la possibilité de se débarrasser d'une relation défaillante et de recommencer à neuf. Dans un rapport de 1975, la Commission de réforme du droit du Canada précisait que « le divorce ne détruit pas nécessairement la vie familiale ». Selon elle, comme les personnes divorcées ont souvent tendance à se remarier, « le divorce peut parfois offrir une solution constructive aux conflits conjugaux, en permettant aux conjoints et aux enfants de créer un nouveau foyer plus viable » 16.

Plusieurs témoins ont affirmé que la plupart des divorces au Canada sont « à faible conflit ». En effet, jusqu'à 90 p. 100 des parents divorcent avec un minimum de conflit. Ses parents sont apparemment capables de dissoudre le mariage et d'établir des plans solides pour les enfants, sans passer en cour. Puisque les recherches en santé mentale démontrent que les conflits entre parents sont dommageables pour les enfants, on pourrait conclure que les divorces peu conflictuels ne causent pas de préjudice permanent aux enfants.

Cependant, tous les témoins sont d'accord pour dire que les divorces très conflictuels sont extrêmement dommageables pour les enfants et les adultes touchés. Personne n'a pu fournir de données exactes à ce sujet, mais le chiffre de 10 p. 100 souvent cité signifie que d'après les données de 1994-1995, environ 4 700 enfants sont exposés chaque année à des tensions constantes dans la famille, à des disputes et même à des actes de violence.

C. L'incidence du divorce sur les enfants

Durant les audiences tenues à travers le Canada, le Comité a entendu d'émouvants témoignages sur les effets néfastes du divorce sur les enfants. Rares sont les témoins qui ont appuyé l'affirmation selon laquelle les décisions prises en fonction du droit des parents au bonheur servent automatiquement les intérêts des enfants. Les témoignages sur les effets préjudiciables du divorce sur les enfants ont été dans une large mesure corroborés par les articles parus récemment à ce sujet dans le domaine de la santé mentale :

Le divorce est considéré dans la perspective individuelle plutôt que sociétale. La *Loi sur le divorce* confère un statut légal à une décision individuelle en vue de mettre fin à un mariage, reconnaissant ainsi, à des fins légales, le droit à se marier et à mettre fin à un mariage. Le fait que ce droit individuel, s'il est réalisé, peut avoir des conséquences sur les droits d'autres personnes n'est pas reconnu par nos lois. En conséquence, l'équilibre des droits, qui caractérise en général la législation sociale, est absent de la législation en matière de divorce et de droit familial. (Alexandra Raphael, réunion 13, Toronto)

Certains témoins ont même suggéré que soit abrogée la loi actuelle, qui permet le divorce sans faute, et que les parents soient tenus de rester ensemble pour le bien des enfants. C'est sans doute ce genre de réflexion qui a motivé les modifications apportées récemment en matière de divorce dans l'État de la Louisiane et qui rendent plus difficile aux couples qui ont des enfants le divorce rapide, sans égard à la faute. Entré en vigueur en août 1997, le *Covenant Marriage Act* de la Louisiane oblige les couples à suivre des séances de préparation au mariage et à obtenir une consultation conjugale si des problèmes surgissent. Cette loi réintroduit également la notion de la conduite dans les demandes de divorce.

En 1989, Judith Wallerstein et Sandra Blakeslee ont publié Second Chances: Men, Women and Children a Decade after Divorce. Cette étude novatrice, citée par nombre de témoins, suit 161 enfants dans 60 familles

Richardson, p. 219.

pendant 10 ans après le divorce ¹⁷. Elle a suscité de vives réactions chez les professionnels de la santé mentale, car les conclusions mettent en doute l'hypothèse selon laquelle la plupart des enfants ne sont pas touchés par le divorce. Contrairement aux attentes de Mme Wallerstein, la plupart des enfants suivis présentent de grandes difficultés à l'école et dans leurs relations personnelles et sociales. Elle a constaté une augmentation notable de l'usage de la drogue et de l'alcool chez ces enfants ainsi qu'un taux plus élevé de délinquance. En outre elle remarque un taux élevé de dépression, d'agression et de retrait de la société. L'étude met en doute également l'idée selon laquelle il y aurait des effets préventifs à long terme à ce que les enfants expriment leurs sentiments en thérapie au moment du divorce; bon nombre vivent en effet de graves difficultés dans leurs relations adultes.

Les professionnels ont fait preuve d'un grand scepticisme face à cette étude, jugeant l'échantillon trop petit et mettant en doute la méthodologie de recherche employée par Mme Wallerstein. Cependant, presque 10 ans plus tard, en 1998, à la Conférence annuelle de l'Association of Family and Conciliation Courts tenue à Washington, D.C., et à laquelle ont assisté des membres du Comité, un panel de sociologues et de psychologues a affirmé que de vastes recherches menées aux États-Unis et en Grande-Bretagne confirment les conclusions de Mme Wallerstein.

En effet, Lamb, Sternberg et Thompson ont publié en 1997 un article sur les effets néfastes du divorce sur les enfants :

La plupart des enfants de familles divorcées vivent une détérioration marquée de leur situation économique, l'abandon (ou la peur d'être abandonnés) par l'un des parents ou les deux, une diminution de la capacité des parents à veiller de manière significative et constructive aux besoins de leurs enfants (parce qu'ils sont préoccupés par leurs propres difficultés psychologiques, sociales et économiques ainsi que par les tensions liées aux procédures judiciaires du divorce) et la réduction des contacts avec les personnes qui leur sont familières ou qui pourraient être sources de soutien psychosocial (amis, voisins, enseignants, camarades de classe, etc.), ainsi que la perte du milieu de vie auquel ils sont habitués. Par conséquent, le divorce constitue un facteur de stress psychosocial, marque une transition importante pour la plupart des enfants et laisse chez bon nombre d'entre eux des séquelles à long terme. Certains enfants de familles divorcées finissent par présenter des problèmes de comportement, sont déprimés ou réussissent mal à l'école, ont des réactions extrêmes ou une faible estime de soi et (chez les adolescents et les jeunes adultes) éprouvent des difficultés à entretenir des relations hétérosexuelles intimes 18.

De leur côté, MM. Amato et Keith ont analysé 37 études sur le divorce chez 81 000 personnes, qui portent sur les conséquences à long terme du divorce pour le bien-être des adultes. Or l'analyse indique des répercussions marquées chez les adultes et les enfants. Les auteurs en viennent à la conclusion suivante :

Judith S. Wallerstein et Sandra Blakeslee, Second Chances: Men, Women and Children a Decade After Divorce (Boston: Houghton Mifflin Company, 1989), p. 299.

Michael E. Lamb, Kathleen J. Sternberg et Ross A. Thompson, « The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment », Family and Reconciliation Courts Review, vol. 35, nº 4 (octobre 1997), p. 395-396.

Selon les données, le divorce a des conséquences profondes et néfastes sur la qualité de vie à l'âge adulte, lesquelles comprennent : la dépression, une faible satisfaction de vivre, une piètre qualité de vie conjugale et le divorce, un mauvais rendement scolaire, un faible revenu, un travail insatisfaisant et des problèmes de santé physique. Ces constatations donnent lieu à une triste conclusion. Est tout à fait incompatible avec la documentation à ce sujet l'argument selon lequel le divorce des parents n'a que peu d'effets sur le développement à long terme des enfants ¹⁹.

En 1997, Hope, Power et Rodgers ont fait rapport d'un projet de recherche fondé sur une étude nationale longitudinale portant sur 11 407 hommes et femmes nés en Grande-Bretagne en 1958²⁰. Selon cette étude, les enfants de parents divorcés sont, quand ils arrivent à l'âge de 33 ans, beaucoup plus à même d'avoir des problèmes d'alcool que ceux de familles intactes.

En dernier lieu, l'étude de Mme Wallerstein indique qu'il n'existe pas encore de façon adéquate de préparer les enfants au stress d'un divorce. La thérapie et le conseil peuvent être utiles au moment de l'événement, mais ils n'ont pas, à long terme, d'effets préventifs²¹.

Des études récentes sur les modes d'attachement de l'enfant indiquent aussi que le divorce peut causer de grandes difficultés émotionnelles chez les jeunes enfants (0 à 48 mois). Mme Ainsworth et ses collègues ont cerné quatre modes distincts d'attachement de l'enfant pour ses parents qui vont de « l'attachement sûr » à « l'attachement désordonné et désorienté »²². Mmes Pamela Ludolph et Michelle Viro ont signalé en 1998 que la désorganisation et les bouleversements causés par un divorce soi-disant amical détruisent chez les jeunes enfants le sentiment de sécurité dans le lien qui les unissent à leurs parents et créent chez eux un sentiment d'insécurité dans l'attachement²³. Les liens solides entre les enfants et les parents se détériorent dans des situations hautement conflictuelles, et l'attachement devient désorganisé et désorienté.

La documentation dans le domaine de la santé mentale et les témoignages livrés, particulièrement par des jeunes, ont convaincu le Comité que le divorce a une incidence profonde et, parfois, funeste sur les enfants. Les parents et leurs conseillers doivent être informés des répercussions possibles de leurs décisions sur leurs enfants afin qu'ils puissent réduire les préjudices causés. Les parents exercent un certain contrôle sur une partie de nombre de facteurs, pouvant aider à améliorer le sort des enfants après une séparation. Le Comité a été impressionné par les solutions créatives adoptées par certains parents et s'est senti encouragé par les quelques exemples très positifs d'arrangements parentaux réussis. Pour contribuer à améliorer la situation des enfants dont les parents divorcent, le Comité et les autres qui poursuivront ce genre de travaux devront approfondir leur compréhension des conséquences du divorce pour les enfants et étudier tous les éventuels mécanismes d'aide pour les parents et les enfants dans cette situation.

Plusieurs questions ont été soulevées devant le Comité par des groupes et des particuliers représentant les intérêts des adultes des familles en instance de divorce. Bien des femmes ont fait part au Comité d'idées et

Paul R. Amato et Bruce Keith, « Parental Divorce and Adult Well-Being: A Meta-analysis », Journal of Marriage and the Family, vol. 53 (février 1991), p. 54.

Steven Hope, Chris Power et Brian Rodgers, « The Relationship between Parental Separation in Childhood and Problem Drinking in Adulthood », Addiction, vol. 93, nº 4 (1998), p. 505-514.

Comme l'indiquent Mmes Wallerstein et Blakeslee dans Second Chances, « [Nous supposions que] les enfants, si nous les aidions à reconnaître leurs sentiments au moment du divorce, se débrouilleraient mieux au cours des années suivantes. Mais ce que nous constatons dix ou quinze ans plus tard contredit cette hypothèse. Certains des enfants qui paraissaient les moins troublés et déprimés, les plus calmes et heureux sont en piètre état dix et quinze ans plus tard. Il est impossible de prédire, à partir des réactions des enfants au moment du divorce, les effets à long terme ». (p. 15).

²² M. Ainsworth, M. Blehar, E. Walters et S. Wall, *Patterns of Attachment* (Hillsdale N. J.: Erlbaum, 1978).

Pamela Ludolph et Michelle Viro, « Attachment Theory and Research: Implications for Professionals Assisting Families of High Conflict Divorce », papier présenté à la 35° Conférence annuelle de l'Association of Family and Conciliation Courts, Washington, D.C., mai 1998.

de préoccupations au sujet des arrangements parentaux visant les enfants du divorce. Certains témoins, des mères, ont raconté leurs expériences personnelles. D'autres représentaient des groupes de femmes locaux et nationaux. D'autres ont parlé de leurs expériences de travail dans des organismes de services sociaux et des refuges pour femmes. Ces témoins ont cerné trois grands secteurs de préoccupation.

Premièrement, elles ont dit que la violence est un problème sérieux pour bien des femmes durant leur mariage et que le risque de violence faite aux femmes et aux enfants culmine au moment de la séparation. Lors de leur comparution de nombreuse femmes, des chercheurs et des représentantes de groupes de femmes, d'organismes de services sociaux communautaires et de refuges pour femmes ont parlé de violence familliale. Ces témoins ont mis en évidence les données sur la fréquence des actes de violence commis sur les femmes, notamment celles contenues dans l'*Enquête sur la violence envers les femmes* de Statistique Canada. Selon ce sondage de 1993 qui porte sur le vécu de 12 000 Canadiennes, 29 p. 100 des femmes signalent avoir fait l'objet de violence dans le cadre de leur mariage ou union de fait. Le litigieux et grave problème de la violence conjugale et la réaction du Comité à l'égard de cette question sont présentés plus en détail au chapitre 5 du présent rapport, qui porte sur les complications inhérentes aux divorces hautement conflictuels.

Deuxièmement, elles ont dit au Comité que, dans la plupart des familles, ce sont encore essentiellement les femmes qui s'occupent des enfants et qu'elles doutaient qu'il en soit bien autrement après le divorce. Les porte-parole des femmes ont souligné que, dans la majorité des cas, les femmes constituent encore le parent le plus présent avant la séparation et qu'à ce titre elles devraient conserver ce rôle après la séparation et le divorce. Toujours selon les mêmes témoins, s'il est vrai qu'aujourd'hui la plupart des femmes aimeraient que leurs maris jouent un plus grand rôle auprès des enfants, des études montrent toutefois que les femmes continuent de s'occuper au premier chef des soins à donner aux enfants. D'après les porte-parole des femmes, de nombreux hommes demandent à partager les responsabilités parentales après le divorce non parce qu'ils veulent vraiment partager les responsabilité parentales, mais plutôt pour continuer à exercer un contrôle sur les décisions de leurs ex-épouses ou pour réduire la pension alimentaire à verser au titre des enfants.

Ce n'est pas au moment de la rupture d'un mariage qu'il convient de redéfinir les responsabilités des parents à l'égard de leurs enfants dans l'intérêt de l'égalité des sexes. Il y a plutôt lieu, à ce moment-là, de décider de ces responsabilités dans la perspective de l'intérêt de l'enfant, en fonction de la relation actuelle de l'enfant avec chacun de ses parents, telle qu'elle s'est développée au cours de sa vie. (Elaine Teofilovici, YWCA, réunion 8)

Les responsabilités parentales sont réparties d'une certaine manière au sein de nos familles lorsque les deux parents vivent ensemble, et selon cette répartition, dans la majorité des cas, c'est la femme qui prend soin des enfants. Il faut souligner que cette répartition n'a pas récemment évolué de manière significative, même si nos structures sociales ont été complètement bouleversées au cours des 20 à 30 dernières années [...] Je pense qu'il me faut demander ici au Comité de tenir compte des véritables limites qui s'imposent au droit lorsqu'il s'agit de changer les comportements des parents après un divorce. (Carole Curtis, Association nationale de la femme et du droit, réunion 8)

[J]e ne peux m'empêcher de noter qu'il y a quelque chose d'insolite dans cette pièce. Il y a un tas d'hommes présents, ce qui n'arrivait jamais dans mon tribunal. Je ne sais pas où ils étaient, mais lorsque les enfants étaient en difficulté, c'était les mères qui venaient. Les hommes se présentaient en général à contrecoeur — lorsqu'il s'agissait d'un défaut de paiement de la pension alimentaire ou d'un autre problème. (Herbert Allard, juge retraité de la cour de la famille, réunion 20, Calgary)

Enfin, elles ont affirmé que le problème des modalités du partage des responsabilités parentales n'a pas trait au refus d'accorder du temps de visite, mais bien souvent à la difficulté d'obtenir du père qu'il continue de s'occuper de ses enfants après le divorce.

De nombreux pères ont parlé du droit de visite qui leur était refusé, mais bien des femmes pensent que le problème est inverse parce que les pères ne se prévalent pas du droit de visite qui leur a été accordé par entente ou par ordonnance de la cour. Dans ces situations expliquent les mères et les groupes de femmes qui ont comparu, ce sont les mères qui doivent faire face à la déception, à la tristesse et à la colère de l'enfant dont le père ne s'est pas présenté.

Imaginez un instant deux jeunes enfants revêtant leurs plus beaux habits, préparant leurs petites valises ou sacs à dos, en attendant que papa vienne les prendre. Ils sont tout énervés; ils attendent impatiemment la visite du père. Maman aussi attend, parce qu'elle espère pouvoir ranger la maison en leur absence, aller travailler à l'extérieur, gagner quelques dollars de plus ou que sais-je encore. Ils attendent... ils attendent! Le téléphone sonne. C'est papa. Il ne peut pas venir [...] Trop souvent, le droit de visite n'est pas exercé de façon régulière et prévisible, ce qui est source de déception chez les enfants qui se tournent alors vers leur mère pour se faire consoler. Maman bouleverse ses plans, elle consacre toute son énergie à ses enfants pour les consoler de leur déception et du sentiment de rejet provoqué par l'annulation de la visite du père. Le coût, financier et émotif pour les enfants et pour la mère, est élevé. (Cori Kalinowski, Comité canadien d'action sur le statut de la femme, réunion 8)

Les médias ont fait grand cas des témoignages devant le Comité de nombreux pères d'un bout à l'autre du Canada. Certains avaient commencé à préparer leur exposé et à en prévenir d'autres de l'existence du Comité avant même que les audiences publiques ne soient annoncées officiellement. Qu'ils aient témoigné à titre individuel ou comme représentants de groupes de pères, ces hommes ont en commun la grande tristesse provoquée par une séparation ou un divorce difficile qui a trop souvent abouti à la quasi-absence de relation avec leurs enfants. La plupart de ces témoins ont insisté sur l'importance d'une solide relation entre père et enfant après un divorce.

Les principaux griefs exprimés par ces témoins concernent les obstacles qui empêchent les pères d'entretenir des relations avec leurs enfants : le parti pris des tribunaux contre les hommes, les pratiques déloyales des avocats, les lacunes de l'appareil judiciaire, les fausses allégations de sévices, l'aliénation parentale et la non-application des ordonnances et des ententes touchant les droits de visite. Ces trois dernières questions sont étudiées plus en profondeur dans d'autres sections du présent rapport — les fausses allégations de sévices et l'aliénation parentale au chapitre 5 (Complications inhérentes aux divorces très conflictuels) et l'application du droit de visite au chapitre 4 (Rôles du gouvernement fédéral et des provinces).

Les membres du Comité ont étudié toutes les préoccupations exprimées par les témoins et en ont tenu compte dans leurs recommandations.

D. La relation père-enfant doit survivre au divorce

Le Comité a entendu de nombreux témoignages sincères et émouvants de la part de parents, de grands-parents et de professionnels au sujet du tort que subissent les enfants quand un parent s'immisce dans la relation avec l'autre parent. Des parents non résidents, souvent des pères, ont parlé non seulement de leur propre douleur quand du temps parental leur est refusé, mais aussi du préjudice que de tels refus causent aux enfants.

Dans bon nombre d'ouvrages et d'articles spécialisés sur les enfants et le divorce, on en vient à la conclusion qu'il est dans l'intérêt de l'enfant que celui-ci maintienne ses contacts avec les deux parents après le divorce. Seule exception à cette règle, l'enfant qui subit des sévices de l'un des parents ou voit l'un de ses

parents violenté par le conjoint. La plupart des spécialistes estiment que, dans ces cas, le temps parental du parent violent doit être grandement limité ou supervisé.

De nombreux témoins ont confirmé les bienfaits de contacts réguliers avec les deux parents :

L'enfant a le droit de maintenir le contact avec ses deux parents et ses beaux-parents à la suite d'une séparation ou d'un divorce, quelle que soit la nature et l'état de la relation entre ces adultes, sauf si le contact avec un parent ou une autre personne qui s'occupait de lui dans le passé peut constituer un risque sur le plan physique, psychologique ou sexuel. (Barbara Chisholm, Association des travailleuses et travailleurs sociaux de l'Ontario, réunion 13, Toronto)

Pendant que nous nous disputons sur des notions théoriques, des procédures légales, des ordonnances et des définitions de problèmes, nous passons complètement à côté de la question la plus importante pour les enfants et les jeunes : le besoin de vivre et de ressentir des liens solides d'amour et d'intimité avec les adultes signifiants de leur vie et de leur entourage. [...] Je pense par ailleurs que, en ce qui a trait à l'interdiction de visite, [...] les enfants, surtout les très jeunes enfants, se développent très rapidement et que [...] le temps qu'ils n'ont pas passé avec un des parents à ces stades précoces de formation est perdu à tout jamais. (Fred Matthews, Central Toronto Youth Services, réunion 14, Toronto)

La question qui se pose donc pour moi est de savoir pour quelle raison certains enfants doivent être placés dans une situation où un parent éprouve le besoin d'être beaucoup plus important que l'autre. La plupart des enfants auxquels j'ai parlé voudraient être avec leurs deux parents, c'est tout ce qu'ils veulent. Ils laissent inconsciemment traîner des objets chez le parent avec qui ils ne vivent pas [afin d'y retourner]. (Ken Taylor, Edmonton and Northern Alberta Custody and Access Mediation Program, réunion 20, Calgary)

C'est pourquoi je dis que nous devrions faire porter l'accent sur le droit de l'enfant, pour insister après le divorce, après la séparation, sur le fait que les enfants ont droit à cette participation équitable et aux soins de la mère et du père. (Sharman Bondy, avocate, réunion 12, Toronto)

Edward Kruk, professeur en travail social de l'Université de la Colombie-Britannique, étudie les enfants et le divorce depuis 20 ans. Il a précisé que, selon une étude américaine, plus de 50 p. 100 des enfants perdent contact avec le père non gardien. Il en déduit, d'après les données canadiennes de 1994 selon lesquelles 47 667 enfants ont fait l'objet d'une décision en matière de garde, dont 33 164 ont été confiés à la garde exclusive de leur mère, que 16 582 de ces enfants perdront éventuellement tout contact avec leur père.

Ceux qui travaillent dans le domaine de l'affliction et de la perte disent qu'il n'y a vraiment rien de pire que de perdre un enfant, quelle que soit la façon dont cela se produit, mais en fait il y a bien pire encore : pour un enfant, la perte d'un parent qui a toujours été une présence aimante dans sa vie, la perte d'un parent qui fait partie de son identité même d'enfant et qui est un élément intégral de sa personnalité. (Edward Kruk, réunion 27, Vancouver)

Il nous faut établir la présomption que l'enfant continuera d'avoir deux parents après la séparation. C'est certainement ce qui convient le mieux à l'enfant. Comment avoir deux parents dans sa vie pourrait ne pas lui convenir? L'enfant naît avec deux parents. C'est Dieu qui a fait les choses ainsi. C'est le plan de Dieu et il semble injuste que l'enfant n'ait plus qu'un parent après une séparation et un divorce. Il faut se demander ce qui vaut le mieux pour l'enfant. (Yvonne Choquette, Fairness in Law, réunion 12, Toronto)

J'appelle cela la mentalité de l'amour limité. Et pourtant, les enfants ne peuvent que bénéficier d'un surcroît d'amour. C'est cette notion de l'amour limité qui amène la mère à penser que si son enfant voit son père, il aura moins d'amour pour elle. C'est une réaction tout à fait immature, mais bien réelle. C'est la réaction émotive au divorce. (Nardina Grande, Step-Families of Canada, réunion 13, Toronto)

Les porte-parole de nombreux groupes de pères partout au Canada ont activement appuyé ces témoignages. Ces hommes et leurs alliés ont préconisé le droit des enfants et de leurs pères d'entretenir une relation, et ont expliqué les dangers qu'il y a à nuire à ces relations.

Les enfants se définissent en fonction de leurs parents. Ils structurent leur identité en prenant leurs parents comme modèles. Le fait de ne pas permettre à l'enfant de bénéficier d'un régime stable de rapports avec le parent non gardien revient ni plus ni moins à le violenter, ce qui entraîne toutes sortes de problèmes de société coûteux à mesure que l'enfant grandit. (Heidi Nabert, National Shared Parenting Association, réunion 7)

Ma famille est morte. Elle a disparu. Elle n'existe plus. Le système lui a asséné un coup de grâce. Voici comment le système a aidé : il m'a tout pris — mon estime de moi-même, ma confiance, mon assurance de jeune homme, ma sécurité, ma tranquillité d'esprit et la capacité de composer avec la vie. Quant à mes parents, ils ont perdu beaucoup d'argent et ils ont aussi perdu tout contact avec moi pendant de nombreuses années. Toute notre famille élargie a été détruite. La plupart des enfants du divorce réagissent à cette réalité pénible en se tournant vers la petite criminalité, la toxicomanie et la promiscuité sexuelle. (Danny Guspie, National Shared Parenting Association, réunion 7)

E. Les préjugés relatifs au sexe et les tribunaux

De nombreux pères ont parlé de leur expérience de l'appareil judiciaire et du parti pris des tribunaux contre les hommes. Pendant plusieurs décennies, jusqu'au milieu des années 70, les tribunaux fondaient souvent leurs décisions en matière de garde et de droit de visite sur la « doctrine du bas âge». Selon cette doctrine, la mère était en général autorisée à garder un enfant en bas âge, soit de la naissance jusqu'à l'âge de 7 ans, âge après lequel le père devenait habilité à garder l'enfant. Cette doctrine de la common law a été rejetée par la Cour suprême en 1976²⁴. Depuis, elle a été remise en question par des juges à l'occasion et remplacée par une analyse fondée sur l'examen de « l'intérêt supérieur de l'enfant ». La « doctrine du bas âge » ne fait plus partie actuellement du droit de la famille ou de la jurisprudence, mais selon bien ces témoins, les juges continuent de présumer que les mères font de meilleurs parents.

Depuis longtemps le Canada prend en considération le sexe des parents dans les décisions relatives à la garde des enfants. Cette préférence accordée à l'un des deux groupes est entretenue par les juges dans les salles d'audience, même s'il n'est nullement prouvé qu'un des deux sexes a une compétence parentale supérieure innée. En réalité, le fait de s'appuyer sur le sexe des parents pour déterminer la garde peut défavoriser les enfants en les privant du parent qui leur convient le mieux. (Paul Miller, Men's Educational Support Association, réunion 20, Calgary)

Quand je me présente devant le tribunal avec un client de sexe masculin qui demande la garde, c'est une bataille qu'il faut livrer pied à pied. Je dois toujours avoir des facteurs particuliers à invoquer pour avoir une chance d'obtenir la garde. (Michael Day, avocat, réunion 12, Toronto)

J'exerce le droit depuis 35 ans. [...] Lorsque j'ai commencé ma carrière d'avocat, maman restait à la maison et s'occupait des enfants, et papa assurait la subsistance de la famille. Nous avons évolué et nous avons adopté l'idée voulant que lorsqu'il s'agit de garde d'enfants et de pension alimentaire la mère soit plus au courant mais que le père paye mieux. (Bruce Haines, avocat, réunion 12, Toronto)

Quand les gens vivent un divorce, ils deviennent souvent très égocentriques et, malheureusement, leurs avocats respectifs les y encouragent en faisant du bon travail pour eux. [...] Je leur dit plutôt qu'ils forment encore une famille — une famille divisée et séparée,

²⁴ Talsky c. Talsky, [1976] 2 R.C.S. 292.

peut-être, mais une famille quand même jusqu'à ce que les enfants aient atteint l'âge de la majorité — et qu'ils ont tout intérêt à s'entendre pour éviter que les enfants n'en souffrent. [...] D'après ce que j'ai pu constater, il y a beaucoup de pères qui s'occupent très bien de leurs enfants. J'ai entendu des femmes me dire qu'elles ne se souciaient absolument pas du résultat de l'évaluation puisqu'elles allaient avoir la garde de leurs enfants de toute façon, « parce que les femmes l'obtiennent toujours ». (Marty McKay, réunion 13, Toronto)

Wayne Allen, de Kids Need Both Parents, a cité les propos du juge Norris Weisman à Toronto pour appuyer l'argument selon lequel le sexe n'est pas un indicateur fiable de la qualité des compétences parentales et que les deux parents doivent continuer à s'occuper des enfants : « [...] il n'est pas rare que le parent qui a la garde de l'enfant se serve de son enfant comme d'une arme dans la guerre matrimoniale, afin de saboter le droit de visite ». Citant la juge Karen Johnson dans sa déclaration du 15 juillet 1993, Mme Allen a ajouté : « Le tribunal devrait prendre pour hypothèse que, si la sécurité physique, mentale ou psychologique de l'enfant n'est pas en danger, il doit chercher à ce que les deux parents continuent à jouer un rôle dans la vie de l'enfant; idéalement leur participation serait la même qu'avant la séparation ». (Réunion 13, Toronto)

F. Pratiques douteuses de certains avocats du droit de la famille et lacunes de l'appareil judiciaire

De nombreux témoins, dont quelques avocats, ont affirmé que certains avocats du droit de la famille ont l'habitude de faire escalader le conflit entre les parents qui divorcent. Pour ce faire, ils encouragent leurs clients à formuler de fausses déclarations d'abus et ils encouragent les femmes à faire état d'actes de violence afin de s'assurer un avantage dans les différends concernant les responsabilités parentales et la propriété.

Le président Lincoln a dit un jour : « il n'y rien de plus dangereux pour la société qu'un avocat affamé ». Eh bien, il y a maintenant 25 000 avocats qui pratiquent le droit en Ontario alors qu'il y en avait 5 000 lorsque j'ai commencé. Les problèmes juridiques de la population n'ont pas été multipliés par cinq [...]. Nous avons donc 25 000 avocats affamés. (Richard Gaasenbeek, avocat, réunion 12, Toronto)

Cependant, lorsqu'ils vont voir un avocat, lorsqu'ils se trouvent devant un différend concernant la garde de leurs enfants ou en situation de divorce, ils remettent un chèque en blanc à quelqu'un qu'ils n'ont jamais vu auparavant, et les voilà partis dans une aventure qui va leur coûter toutes leurs économies. C'est une vraie honte. (Michael Cochrane, avocat, réunion 13, Toronto)

J'ai dit à l'avocat que je ne connaissais pas mes droits, que je voulais mettre un terme à mon mariage et que je voulais savoir si je perdrais mon droit de propriété si je quittais la maison. Sa réponse m'a choqué. [...] L'avocat m'a déclaré que je devais faire en sorte qu'il me frappe. [...] Voilà en effet ce que m'a dit un avocat. Nous avons été mariés 17 ans et mon mari n'a jamais levé la main sur moi. Pourtant l'avocat m'a dit que si j'arrivais à faire en sorte qu'il me frappe, je pourrais le faire expulser de la maison et que j'obtiendrais la pension alimentaire du conjoint. (Heidi Nabert, National Shared Parenting Association, réunion 7)

Puis on a ce que j'appellerais les avocats « barracudas » qui, eux, enflamment le système. Je dirais qu'ils le font sans doute pour des raisons financières. Ce genre d'avocats existe. Ils sont plutôt rares, mais il y en a. Ils profiteront d'un client vulnérable sur le plan émotif et ils l'influenceront pour l'amener à faire toutes sortes de choses inutiles et coûteuses — les choses qu'ils font sont légales — pour faire avancer leur affaire. (Susan Baragar, avocate, réunion 22, Winnipeg)

Certains avocats introduisent dans les procédures de divorce de fausses allégations de comportement criminel en les reproduisant dans les affidavit, sans qu'elles aient été confirmées par les autorités policières ou d'aide à l'enfance et sans que le parent accusateur ou son avocat en subisse les conséquences. (Louise Malenfant, Parents Helping Parents, réunion 22, Winnipeg)

Plusieurs témoins ont également mis en évidence les lacunes d'un appareil du droit de la famille et, qui permet le dépôt en cour d'affidavits sans exiger de preuves. Ces témoins se demandent pourquoi les normes applicables à la preuve en droit criminel et civil ne s'appliquent pas devant les tribunaux de la famille.

Comme avocat au criminel, j'ai affaire à des accusés qui jouissent de la protection de la Charte des droits et libertés et de la Common Law lorsqu'ils comparaissent devant le tribunal. Je suis surpris que dans le cas du droit de la famille, on décide des relations futures entre les parents, les enfants et les grands-parents sans vraiment tenir compte de la procédure établie [...] Le parjure est chose courante, mais comment mettre en prison pour un mensonge un conjoint ayant la garde? Par conséquent, le droit de la famille se pratique à huis clos ou en audience publique sans transcription et sans aucune des sanctions de base auxquelles nos tribunaux ont toujours pu avoir recours pour contrôler le processus. (Walter Fox, avocat, réunion 13, Toronto)

Chapitre 2 : Améliorer le sort des enfants

A. Écouter le point de vue des enfants

Ils pensent qu'on a 9 ans et qu'on ne connaît rien. Mais c'est notre vie. (Témoin de 15 ans)

Ils décident de notre vie et de notre avenir, mais ils ne nous connaissent même pas. (Témoin de 13 ans)

Les enfants ne demandent pas que leurs parents divorcent. Le Comité a entendu le témoignage d'enfants dans tout le Canada, et aucun n'a dit que le divorce était une bonne chose.

Lorsque leurs parents divorcent, les enfants sont aux prises avec de nouvelles inquiétudes et craintes au sujet de ce qui leur arrivera. Ils ne sont pas habitués à ces préoccupations et à ces craintes, et ils ont tendance à vouloir se débrouiller tout seuls.

Il y a beaucoup de sentiments étranges. Des sentiments qu'on n'a jamais eus. Tout le monde dit que ce n'est pas notre faute, mais on se demande parfois. (Témoin de 14 ans)

Les enfants ont dit qu'ils se sentaient laissés pour compte dans une démarche qui, souvent, va déterminer leur mode de vie quotidien pour bien des années à venir. De nombreux avocats et professionnels de la santé mentale estiment que les enfants doivent avoir leur mot à dire dans la procédure de divorce.

Le comité a entendu des mères, des pères, des parents qui ont la garde, des parents qui ne l'ont pas, des avocats, des juges, des psychologues, une foule de spécialistes, mais je n'ai pas l'impression qu'il a entendu le témoignage de ceux dont il s'agit vraiement ici, les enfants. [...] Lorsque l'on prend le temps d'écouter les enfants et que l'on se soucie en priorité de leur intérêt, on voit ce qu'il faut faire pour chaque famille d'un oeil totalement différent. [...] La plupart des enfants, cependant, connaissent leurs propres sentiments et ils savent ce qu'ils veulent et ce dont ils ont besoin de la part de leurs parents. Tous les enfants ont besoin que leurs parents cessent de se quereller. [...] Les enfants ne peuvent pas comprendre que quelqu'un qu'on ne voit pas, quelqu'un qu'on appelle le juge, a déclaré qu'à partir de maintenant ils allaient visiter un de leurs parents, en général le père, et encore, pas très souvent et qu'ils ne verraient plus tous les jours comme auparavant un de leurs parents. (Kathleen McNeil, *Mom's House-Dad's House*, réunion 27, Vancouver)

Quand les adultes décident de divorcer, ils connaissent la raison de leur décision et sont, en général, confiants que les choses s'arrangeront avec le temps. Souvent, ils ont aussi un réseau de soutien — leur famille et leurs amis — qui les aidera à traverser cette période de transition difficile sur le plan émotif et pratique. Enfin, les adultes ont directement accès à des avocats qui plaideront leur cause et feront leur possible pour faire accepter les arrangements qu'ils croient être les meilleurs pour leurs enfants.

Je leur ai demandé : Pourquoi divorcez-vous? Pourquoi est-ce que ça doit arriver? (Témoin de 10 ans)

Les enfants sont souvent surpris que leurs parents décident de divorcer. Certains ont dit au Comité qu'ils savaient que les relations étaient tendues entre leurs parents avant la séparation, mais qu'ils ne s'attendaient

pas à ce qu'ils divorcent. Ils n'avaient pas l'impression d'avoir leur mot à dire dans la décision et se retrouvaient face à l'incertitude de l'avenir. Ils n'avaient pas non plus de réseau de soutien comme leurs parents.

La séparation et le divorce sont traumatisants pour les enfants, quel que soit leur âge. Lorsqu'on leur annonce la décision, ils ont peur, s'inquiètent et se posent des questions. Quelles sont ces questions? Voici ce qu'ils se demandent : Où vais-je vivre? Avec qui? Suis-je obligé de partir? Et mes amis? Irons-nous encore en vacances? Est-ce que je pourrai voir mon père? Ma grand-mère? Et le chien? Et le chat? Combien de temps passerai-je avec les uns et les autres? Pourrais-je encore prendre des leçons, jouer au hockey, patiner? Toutes ces questions nous en disent long sur ce qui intéresse les enfants. [...] Pourquoi devrions-nous les écouter? Parce que leur vie est irrémédiablement transformée—sur le plan émotionnel, social et économique. Ils n'ont aucun contrôle sur la décision. Ils sont obligés de l'accepter et effectivement, ils ont du mal à le faire. [...] Aucun enfant ne veut que ses parents se séparent et divorcent. (Sherry Wheeler, Bureau du défenseur des droits des enfants de l'Alberta, réunion 20, Calgary)

Si les enfants qui comptent sur nous pour prendre la bonne décision n'obtiennent pas ce qu'ils méritent, alors nous allons avoir les enfants que nous méritons—des enfants qui ont des troubles affectifs et des difficultés à l'école, qui à l'âge adulte vont répéter les erreurs de leurs parents, qui auront maille à partir avec le système de justice criminelle, qui exigeront une part disproportionnée de nos ressources—bref, des enfants qui ne réaliseront pas leur véritable potentiel, et nous n'aurons pas réussi à réaliser notre potentiel comme société et comme pays. (Michael Guravich, président, Médiation familiale Canada, réunion 26)

Certains enfants ont dit qu'ils s'inquiétaient de la façon dont ils allaient annoncer à leurs amis le divorce de leurs parents. Une petite fille a dit qu'elle était convaincue qu'elle serait le seul enfant dans son école à avoir des parents divorcés.

[...] Nous croyons que les enfants ont besoin de se sentir aimés et protégés. Ils ont besoin de sécurité, et de l'assurance que ce n'est pas leur faute si leurs parents divorcent. Ils ont besoin de savoir que leurs deux parents et les membres de leur famille élargie vont continuer à faire partie de leur vie. Ils doivent savoir aussi que leur point de vue et leurs souhaits ont été pris en considération lors de l'élaboration du plan d'action touchant l'avenir de leur famille. Ils ont besoin de se sentir autorisés à demander des changements à ce plan d'action sans avoir à se sentir coupables envers l'un ou l'autre de leurs parents, ou envers les autres membres de la famille. (Margaret Treloar, Guides du Canada, réunion 13, Toronto)

Plus encore, c'est que les enfants ont le sentiment de ne pas avoir leur mot à dire sur leur avenir. Plusieurs ont dit que tous les enfants devraient avoir quelqu'un pour les représenter lors d'une procédure judiciaire, tel un avocat ou un défenseur des droits des enfants. Une petite fille a dit que, parce qu'elle n'était pas représentée par quelqu'un, on avait pris pour elle et son petit frère des arrangements qui les mettaient en danger lorsqu'ils visitaient l'un de leurs parents.

Ce besoin de représentation ne finit pas avec le divorce. Des enfants ont parlé au Comité des conditions qu'il fallait changer dans les ententes initiales de garde et d'accès. Sans personne pour les aider à exprimer leurs besoins et leurs préoccupations, ces ententes font parfois perdurer des situations dangereuses pour les enfants.

Les membres du Comité ont aussi compris qu'il fallait faire une différence entre entendre les points de vue des enfants et les forcer à choisir entre l'un ou l'autre des parents. Bien des professionnels ont averti le Comité que la plupart des enfants veulent demeurer loyaux envers leurs deux parents après le divorce; les

forcer à choisir un parent plutôt que l'autre, c'est les mettre dans une situation intenable. En fait, bien des membres du Comité sont maintenant convaincus que, quand un enfant veut soudainement briser les liens avec un parent, il y a un problème grave qui nécessite une intervention thérapeutique et non juridique. Les membres du Comité ont débattu les moindres détails de cette question pour trouver des solutions permettant aux enfants d'être consultés et entendus sur les décisions qui les touchent sans qu'ils soient poussés dans une situation émotivement dangereuse.

Tous les enfants qui ont comparu devant le Comité ont insisté sur l'importance d'écouter le point de vue des enfants. Ce message doit être entendu par les parents, qui doivent être encouragés à consulter leurs enfants avec respect lorsqu'ils prennent des dispositions pour leur garde au moment de se séparer, ainsi que par les responsables des politiques et le législateur. Le système juridique s'est déjà montré très souple en concevant des modèles non litigieux de prise de décisions qui tiennent compte des enfants. Les bureaux des porte-parole des enfants ou des défenseurs des droits des enfants, qui existent dans tout le Canada, sont des instruments du gouvernement qu'il faudrait élargir pour permettre aux enfants d'être entendus pendant la procédure de divorce. La section suivante, qui porte sur les droits des enfants, développe ce thème et précise que la Convention des Nations Unies relative aux droits de l'enfant exige que le Canada rende possible la participation efficace des enfants dans les décisions touchant leur vie.

B. Les droits des enfants

L'Assemblée générale des Nations Unies a adopté la *Convention relative aux droits de l'enfant* (la « Convention ») le 20 novembre 1989. Le Canada y a adhéré le 28 mai 1990. Elle est entrée en vigueur le 2 septembre 1990 après avoir été ratifiée par les 30 pays réglementaires. Le Canada, pour sa part, l'a ratifiée en décembre 1991 et a soumis son premier rapport au Comité des Nations Unies sur les droits de l'enfant en juin 1994. Cette Convention, qui est le traité sur les droits de la personne ayant été ratifié par le plus grand nombre d'États dans l'histoire, établit les normes juridiques et morales minimales pour la protection des droits des enfants, notamment les droits et libertés civils, les droits liés à la mise en place de conditions optimales pour la croissance et le développement de l'enfant (soins de santé, éducation, sécurité économique, loisirs), et le droit à la protection contre les abus, l'exploitation, la négligence et les dangers inutiles. La Convention reconnaît expressément le rôle particulier que joue la famille dans les soins donnés aux enfants.

Les principales dispositions de la Convention liées au thème de la présente étude comprennent l'article 3, qui précise que, dans toutes les décisions relatives aux enfants, l'intérêt supérieur de l'enfant doit être une considération primordiale; l'article 9, qui reconnaît le droit de l'enfant séparé de l'un de ses parents d'entretenir des relations personnelles avec ses deux parents; et l'article 12, qui garantit à l'enfant le droit d'exprimer librement son opinion sur toute question l'intéressant.

Au Canada, le gouvernement fédéral, les provinces et les territoires se partagent la responsabilité de voir à l'application de la Convention, comme c'est le cas pour les autres traités internationaux. Tous les ordres de gouvernement ont pris part à la préparation du premier rapport du Canada en vertu de la Convention²⁵. Lorsque les mesures à prendre sont signalées comme ayant été prises ou étant exigées, le rapport indique quel ordre de gouvernement est responsable de la mesure en question. Le paragraphe 149 du *Premier rapport du Canada* précise que le ministère fédéral de la Justice est en train de réexaminer les questions de la garde des enfants et du droit de visite, et que les données empiriques actuelles témoignent que les enfants sont très affectés par la violence familiale, que ce soit en tant que victimes ou témoins. Le *Premier rapport* fait

²⁵ Premier rapport du Canada sur la Convention internationale relative aux droits de l'enfant, à consulter à l'adresse http://www.pch.gc.ca/ddp-hrd/francais/rotc/rc01index.htm.

également remarquer que le gouvernement fédéral est en train de revoir la *Loi sur le divorce* pour déterminer si des mesures devraient être prises afin d'appliquer l'article 12 de la Convention, qui traite du respect de l'opinion des enfants²⁶.

Un certain nombre de témoins ont recommandé au Comité de tenir compte de la Convention, en particulier des articles 3, 9 et 12 concernant l'intérêt supérieur de l'enfant, son droit d'entretenir des relations avec les membres de sa famille et son droit d'être entendu dans toute procédure le concernant. Bon nombre de ces témoins sont d'avis qu'une référence à la Convention dans le préambule de la *Loi sur le divorce* donnerait aux juges des principes directeurs utiles et importants, ce qui permettrait d'améliorer les décisions qu'ils prennent dans les ententes parentales. Katherine Covell, directrice du Centre des droits de l'enfant au Cap-Breton, fait ressortir la pertinence de la Convention dans les décisions relatives à la garde des enfants et au droit de visite :

Aux termes de la *Convention* des *Nations unies relative aux droits de l'enfant*, le Canada est tenu de s'orienter vers une législation et une politique publique qui sert vraiment l'intérêt supérieur de l'enfant. Dans le contexte des dossiers de droits de garde, il existe une abondante documentation publiée en psychologie qui montre que, pour servir l'intérêt supérieur de l'enfant, il faut respecter les deux conditions suivantes : le conflit entre les parents pendant et après le divorce doit être minimisé et, en l'absence de sévices, les enfants doivent continuer d'avoir des relations fructueuses avec les deux parents. (Réunion 30, Halifax)

De nombreux témoins sont également convaincus que la Convention confère à l'enfant un rôle plus grand que dans les décisions actuelles qui le touchent en matière de garde et de droit de visite. Selon les propositions formulées à l'intention du Comité, cette participation pourrait aller d'une pleine représentation juridique et un statut de partie d'office pour chaque enfant dont les parents divorcent, jusqu'à une autre forme de participation où l'on demanderait à l'enfant son avis, d'une façon appropriée à son âge et d'une façon délicate, et où l'on ferait connaître cet avis au(x) décisionnaire(s), qu'il s'agisse des parents, d'évaluateurs ou d'un juge. Me Jeffery Wilson, qui représente un des points de vue dans l'éventail des opinions, estime que la Convention exige une représentation juridique financée par l'État pour chaque enfant. D'autres témoins, notamment les défenseurs des droits des enfants dans chaque province où ce service existe, recommandent que les enfants aient toujours la possibilité de se faire entendre, mais font remarquer que les niveaux actuels de financement des programmes de défense des droits des enfants et les mandats qui les justifient empêchent que les défenseurs des droits des enfants ne jouent eux-mêmes ce rôle.

Les membres ont reçu un message clair de la part de plusieurs enfants qui ont témoigné. Les enfants n'accepteront pas facilement des décisions importantes prises au sujet de leur avenir s'ils n'ont pas été consultés ou si l'on n'a pas tenu compte de leurs désirs. Ceci pourrait avoir des effets graves sur leur capacité à s'adapter aux dispositions prises pour la garde, de même que sur leur santé mentale à long terme. Par conséquent, le Comité conclut que, dans tous les cas, les enfants devraient pouvoir exprimer leur point de vue à un professionnel compétent qui serait chargé de transmettre ces points de vue au juge qui doit établir les ententes parentales. Ce professionnel pourrait être un travailleur social, un psychologue, un avocat, un médecin de famille ou une infirmière capable de communiquer avec les enfants. Toujours selon le Comité, il se peut que, dans certains cas, un membre de la famille élargie soit le mieux placé pour assurer le soutien de l'enfant et défendre ses intérêts devant le tribunal.

Les membres du Comité estiment qu'il est essentiel d'entendre le point de vue des enfants qui se trouvent en particulier dans des situations très conflictuelles et qu'on leur assure une représentation juridique. Il faut que l'enfant soit représenté par un avocat si les avocats de la mère et du père n'ont pas ses intérêts à

²⁶ *Ibid.*, paragraphe 82.

coeur. Les membres ont été particulièrement impressionnés par l'efficacité des tribunaux unifiés de la famille, où les services juridiques sont combinés à des services thérapeutiques, comme ceux de conseillers par exemple, ce qui permet à l'enfant d'avoir accès à un professionnel qui l'écoute et qui l'aide.

En même temps, les membres ont été très sensibles à la nécessité de ne pas obliger les enfants à choisir entre leur père et leur mère. Bon nombre d'entre eux ont trouvé utile le témoignage d'un juge du Michigan, M. John Kirkendall. Le juge a expliqué au Comité que, même s'il demande souvent aux enfants comment ils se sentent, il leur dit toujours que ce n'est pas à eux que revient la décision. Même s'il leur demande leur avis, il dit aux enfants qu'il ne prendra pas nécessairement la décision qu'ils lui demandent de prendre. Les membres estiment également qu'il est important de conseiller aux parents de parler à leurs enfants des arrangements ou des réarrangements possibles en ce qui concerne le partage de responsabilités parentales et la résidence, et d'éviter de leur imposer de nouvelles dispositions sans les consulter.

Une autre question relative aux droits des enfants a été portée à l'attention du Comité. Au Canada, les cours supérieures ont toujours eu le pouvoir ultime d'agir dans l'intérêt supérieur de l'enfant, leur permettant ainsi d'assurer le bien-être de l'enfant, même quand la loi ne prévoit aucune mesure explicite à cet égard. Ce pouvoir tient à la juste compétence des tribunaux d'agir comme «super-parent» de l'enfant, compétence dite *parens patriae*. Selon certains membres du Comité, les tribunaux ont hésité à exercer cette compétence inhérente au nom des enfants et devraient être incités à le faire. Le Comité reconnaît donc que l'enfant a besoin et a le droit d'être protégé par les tribunaux, notamment en vertu de leur compétence *parens patriae*.

Recommandations

- 1. Le Comité recommande que la *Loi sur le divorce* soit modifiée de façon à inclure un préambule qui ferait ressortir les grands principes de la *Convention des Nations Unies relative aux droits de l'enfant*.
- 2. Conscient que les relations parents-enfants ne prennent pas fin avec la séparation ou le divorce, le Comité recommande de modifier la *Loi sur le divorce* en y ajoutant en préambule le principe selon lequel les parents divorcés et leurs enfants ont le droit d'entretenir des rapports étroits et permanents les uns avec les autres.
- 3. Reconnaissant le principe de l'intérêt supérieur de l'enfant, le Comité recommande que :
 - 3.1 les enfants puissent être entendus lorsque des décisions sur les responsabilités parentales les concernant sont prises;
 - 3.2 les enfants dont les parents sont en instance de divorce aient l'occasion d'exprimer leurs points de vue à un professionnel compétent dont le rôle serait de faire connaître ces points de vue au juge, à l'évaluateur ou au médiateur chargé de déterminer ou de faciliter les modalités de partage des responsabilités parentales;
 - 3.3 si un enfant éprouve des difficultés lors de la séparation ou du divorce de ses parents, le tribunal doit avoir la possibilité de nommer une tierce partie concernée (comme un membre de la famille élargie de l'enfant), pour soutenir l'enfant et le représenter;
 - 3.4 le gouvernement fédéral travaille avec les provinces et territoires afin de s'assurer que les structures, procédures et ressources adéquates soient en place pour permettre cette consultation, que ces décisions soient prises en vertu de la *Loi sur le divorce* ou des lois provinciales ou territoriales;

- 3.5 le Comité reconnaît que les enfants du divorce ont besoin de la protection des tribunaux et y ont droit, selon les compétences respectives de ces derniers.
- 4. Le Comité recommande que, lorsque le tribunal estime que l'intérêt de l'enfant l'exige, les juges soient habilités à désigner un avocat chargé de représenter l'enfant. Lorsqu'un avocat est désigné, il doit être mis à la disposition de l'enfant.

C. Atténuer les conflits

C'est terrible quand nos parents crient. Ça peut nous donner mal à la tête ou nous rendre triste. Et puis ça nous donne envie de prendre un nounours et de nous cacher dans le coin pour ne pas sortir... pendant très longtemps. (Témoin de 12 ans)

Le Comité a entendu de nombreux témoins dire que la majorité des divorces se règlent sans grand conflit entre les parents. C'est ce qu'on appelle les « divorces à l'amiable », qui même s'ils sont difficiles pour les enfants, ne sont pas dommageables à long terme. Malheureusement, beaucoup de parents qui divorcent se disputent amèrement et parfois violemment pour obtenir la garde ou un droit de visite. Ces situations sont très dangereuses pour les enfants, et le Comité a examiné la preuve attentivement pour déterminer quels moyens on pourrait prendre pour atténuer les conflits entre les parents qui divorcent, et ce, pour le bénéfice des enfants. En effet, l'objectif principal sous-jacent à toutes les recommandations du présent rapport est d'amorcer un changement dans les politiques et les pratiques du droit de la famille actuelles, qui trop souvent exacerbent les conflits entre parents, pour se retourner vers un mode de prise de décisions qui atténue les conflits.

En cas de divorce [...], il n'y a pas de rites de guérison. Au contraire, on déshonore les parties en les poussant dans un processus de confrontation qui oblige les couples à faire des déclarations sous serment qui humilient publiquement l'autre conjoint. Les membres de la famille, les amis et les voisins sont poussés à prendre parti pour l'un ou l'autre, ce qui cause des divisions permanentes, et les enfants sont traités comme des objets rares qu'on doit répartir comme des biens matériels. (Barbara Landau, réunion 11)

Notre souci, à titre de médiateurs, est d'assurer le bien-être des enfants. Généralement, les parents sont trop pris par leurs problèmes émotifs. Chaque divorce suscite de fortes réactions émotives, même lorsqu'il n'y a pas de différend. Lorsqu'il y en a, c'est l'enfer. (Philip Shaposnick, réunion 11)

Tous les enfants qui ont témoigné devant le Comité ont dit qu'il était terrible de se sentir coincé entre deux parents qui se disputent.

C'est vraiment terrible quand ils se disputent parce qu'on pense qu'il y a quelques années encore, ils étaient heureux dans leur mariage. (Témoin de 14 ans)

Il devrait y avoir une loi pour empêcher les parents qui divorcent de parler à leurs enfants en criant. Ce n'est pas la faute de l'enfant. (Témoin de 8 ans)

Les enfants qui ont témoigné devant le Comité ont également dit que les avocats et les tribunaux ne prennent pas en considération ce qui est important pour eux. Plusieurs ont dit qu'il fallait que les calendriers de visite soient assez souples pour permettre aux enfants de continuer leurs activités sociales ou leurs loisirs même lorsque c'est le moment de voir leur père ou leur mère, pour ne pas causer de ressentiment. D'autres enfants ont précisé que les tribunaux ne comprennent pas l'importance des relations entre enfants de familles reconstituées.

Pour la plupart des enfants qui ont témoigné, il est important d'entretenir des rapports avec les deux parents. Le Comité a remarqué que les enfants n'emploient habituellement pas les mots « garde » et « droit de visite » lorsqu'ils parlent de relations familiales; ce sont des termes qui ne font pas partie du vocabulaire de la plupart d'entre eux. Les enfants ne mesurent pas non plus leurs relations en temps, mais plutôt en termes de disponibilité.

Les psychologues, les psychiatres et les travailleurs sociaux qui ont témoigné devant le Comité dans toutes les régions du pays affirment que bon nombre des enfants qu'ils rencontrent dans leurs cliniques souffrent des conflits qui persistent après le divorce.

Les études démontrent toutes que les enfants ne s'intéressent pas à la question de savoir à qui ils appartiennent, mais plutôt à la manière dont chacun des parents préservera la relation qu'il a avec eux. Nous savons que les enfants ayant vécu des conflits matrimoniaux en ressentent longtemps les effets car ils se trouvent pris entre les deux personnes qui sont les plus importantes pour eux. C'est une position très difficile et très préjudiciable pour eux. (Resa Eisen, réunion 12, Toronto)

Le Dr Eric Hood, du Clarke Institute de Toronto, affirme que les divorces très conflictuels « sont comme des zones de guerre ». Les enfants sont tiraillés entre leurs parents et « ont peur de dire la vérité ». Ce sont eux qui portent le fardeau de la souffrance dans les divorces. Et il ajoute ceci :

Je suis en mesure de vous parler personnellement de ces choses parce que ceux qui, comme nous, essaient d'évaluer et de comprendre ces situations, ceux qui traitent avec les parents et les enfants individuellement, ou ensemble [...], sont profondément stressés et troublés d'avoir à vivre ces situations. C'est comme si nous réagissions de la même manière que les enfants et cela nous mène à vivre des situations très angoissantes. Et si je réagis de cette façon alors qu'il ne s'agit pas de ma famille, comment pensez-vous que réagissent les enfants? (Eric Hood, réunion 12, Toronto)

Malheureusement, je considère les conflits familiaux comme une zone de combat intense qui représente de gros risques pour les enfants. On peut espérer que de temps en temps il y a pour les victimes de guerre, ce que j'appellerais une zone de sécurité. Quand je forme les bénévoles et le personnel avec lesquels je travaille, j'utilise l'image du casque bleu, du casque des gardiens de la paix des Nations Unies. Nous ne pouvons peut-être pas mettre fin entièrement à la guerre et nous ne pouvons pas décider de l'issue de la guerre, mais nous pouvons assurer cette zone de sécurité, qui est tout à fait essentielle pour les enfants. (Sally Bleeker, Programme de visite supervisée d'Ottawa-Carleton, réunion 24)

M. Wilson McTavish est directeur du Bureau de l'avocat des enfants de l'Ontario. Ce service subventionné fournit une représentation juridique à environ 8 000 enfants par année, dont 1 600 font l'objet de disputes sur la garde et le droit de visite.

[...] Nous avons constaté que dans presque toutes les affaires, les deux parents aiment leurs enfants. Chaque enfant que nous représentons plaide en faveur de la réconciliation de ses parents. Les larmes aux yeux, il doit constater que c'est impossible et il nous demande alors de faire cesser les affrontements [...]. (Réunion 12, Toronto)

Dans leurs témoignages, plusieurs professionnels du droit et de la santé mentale se sont dit d'accord sur la façon dont les enfants voient le divorce. Tous s'entendent pour dire que les situations hautement conflictuelles sont dangereuses pour les enfants. Le Comité s'est penché sur un certain nombre de moyens suggérés par des témoins pour réduire les conflits qui, jusqu'à un certain point, semblent être un aspect

presque inévitable du divorce. Certains ont suggéré les programmes d'éducation des parents — pour faire prendre conscience aux parents de leur conduite pendant et après la séparation, des répercussions sur les enfants et des moyens qu'ils pourraient prendre pour en modifier les effets ou à tout le moins pour en protéger les enfants — et d'autres ont mis de l'avant des modèles non litigieux pour la prise de décisions au sujet de la garde des enfants et du droit de visite, notamment la médiation.

1. La terminologie du divorce

De nombreux témoins ont dit que les termes « garde des enfants » et « droit de visite » utilisés actuellement perpétuent l'idée de « gagnant-perdant », qui pourrait être dommageable. Ils ont proposé qu'on adopte des termes plus neutres qui aideraient à atténuer les conflits et inciteraient les parents à penser à leurs responsabilités plutôt qu'à leurs droits. On estime qu'il s'agit là d'un bon moyen de réduire les conflits entre les parents et d'éliminer la course à la garde des enfants. Les membres du Comité ont trouvé important de se pencher sur la question de la terminologie du divorce, car selon eux les témoignages sur l'impact des termes « garde des enfants », « droit de visite », « parent ayant la garde » et « parent n'ayant pas la garde » sont particulièrement convaincants. L'emploi de ces termes peut certainement exacerber les conflits entre les parents, au point même d'entraîner un refus d'accorder la garde ou d'autres disputes.

Il a longuement été question dans les audiences du Comité de l'effet destructeur de la terminologie actuelle.

«Garde» c'est le mot officiel pour emprisonnement et «droit de visite» signifie privilège du prisonnier de voir un avocat, ou vice versa. Ce sont des mots abominables qui font mal au coeur et qui éliminent le droit d'un enfant à avoir un père. Débarrassons-nous de ces mots et de ces concepts. (Gene Keyes, réunion 30, Halifax)

Dans les lois fédérales actuelles, la terminologie crée une situation où il y a perdant et un gagnant, ce qui ne fait qu'exacerber le conflit qui existe entre les parents lors d'une séparation ou d'un divorce. Un tel vocabulaire inapproprié n'appuie pas la famille, et est humiliant pour l'enfant qui constate qu'on utilise les mêmes termes pour parler de lui qu'on utilise pour le système carcéral. (Judy McCann-Beranger, réunion 31, Charlottetown)

De l'avis d'un certain nombre de témoins, la terminologie actuelle non seulement contribue à exacerber les conflits entre les parents, mais porte les parents à mal penser les décisions qu'ils doivent prendre au moment du divorce.

Ce langage, lorsqu'il est question de la garde de l'enfant, reste problématique dans la mesure où il véhicule une notion de propriété des enfants. C'est-à-dire que le langage juridique perpétue la notion selon laquelle les enfants sont un bien dont on est propriétaire, ce qui est tout à fait contraire à la convention de l'ONU et en même temps un manque complet de respect à l'égard des enfants. Sous-entendre ainsi que les enfants sont la propriété des parents contribue à égarer les esprits lorsque l'on parle d'une politique axée sur l'enfant lui-même. Par ailleurs, cela contribue également à aggraver des situations déjà très chargées sur le plan affectif. De plus, le langage actuel des lois peut dans certains cas priver les parents de tout pouvoir. (Elaine Rabinowitz, Comité consultatif sur l'abus sexuel des enfants de l'Île-du-Prince-Édouard, réunion 31, Charlottetown)

La plupart des témoins ont recommandé que le législateur trouve de nouveaux termes pour décrire les décisions parentales prise par les couples qui divorcent, mais quelques-uns ont fait une mise en garde à l'égard d'une nouvelle loi, parce qu'une nouvelle loi signifie invariablement des litiges plus nombreux, pour certains

à tout le moins, en attendant que les tribunaux interprètent le vocabulaire de la nouvelle loi. Néanmoins, le Comité s'est bel et bien rendu compte qu'un changement s'impose à cet égard.

La Loi sur le divorce est truffée d'expressions telles que «garde» et «droit de visite» qui renvoient à une époque révolue où les femmes et les enfants étaient légalement considérés comme la propriété du chef de famille, le père. Il conviendrait de reformuler la loi en employant une terminologie correspondant à la réalité actuelle, c'est-à-dire au fait que tous les membres de la famille ont des droits et où les deux parents sont égaux devant la loi. Donc, en ce qui concerne les responsabilités parentales après le divorce, le but fondamental de la loi devrait être de favoriser la recherche de solutions satisfaisantes. Ces solutions devraient être axées sur le partage des responsabilités en entérinant l'existence de deux foyers parentaux différents. De plus, la loi devrait favoriser au maximum la participation de deux parents aux soins courants dispensés aux enfants issus du mariage, bien que les circonstances puissent exiger que l'on entérine le fait que les enfants vivent chez l'un seulement des deux parents. (Howard Irving, médiateur, réunion 11)

Un certain nombre de témoins ont exhorté le Comité à recommander une terminologie fondée sur le nouveau vocabulaire adopté par d'autres entités administratives, comme dans celles dont il est question au chapitre 3 du présent rapport:

Au sujet de la terminologie, presque tous les pays qui ont modernisé leur législation en la matière depuis une dizaine d'années ont reconnu que des termes comme la «garde» et l'«accès» ne sont pas pertinents. À moins de bien connaître le jargon juridique, les parents n'ont pas naturellement tendance à utiliser ces mots-là. Ils ont une connotation malheureuse. Ce ne sont pas des notions qui reflètent ce que les parents font vraiment ou devraient faire, et ce sont des concepts qui ont tendance à aliéner un parent ou même les deux. Je crois donc que nous aimerions tous avoir des lois qui reflètent vraiment ce que les parents font en réalité. (Nicholas Bala, réunion 6)

D'autres pays ont été cités en exemple devant le Comité pour leur nouvelle terminologie axée sur l'atténuation des conflits. Ainsi, les notions de garde des enfants et de droits de visite pourraient être remplacés par des notions et des expressions telles que «responsabilité parentale» (Australie), «responsabilité parentale conjointe» (Royaume-Uni), «responsabilité parentale partagée»(Floride) ou «placement en résidence» et «fonctions parentales» (État de Washington). La notion de garde pourrait être remplacée par celle de «résidence» avec pouvoir de décider. Ce qu'on appelle accès ou droit de visite au Canada s'appelle «contact», «visite» ou «temps parental» ailleurs. On trouve souvent cette nouvelle terminologie dans les nouveaux régimes légaux, dont certains prennent pour acquis qu'il est normal d'avoir une garde conjointe ou un partage des responsabilités parentales, ou encore une forme de partage des prises de décisions même si le temps n'est pas partagé également. (Voir chap. 3).

Le Comité est d'avis qu'il faut se tourner vers une nouvelle terminologie moins lourde pour atténuer l'aspect conflictuel du divorce. En plus de chercher à réduire les conflits, il est convaincu que le régime de la *Loi sur le divorce* ne doit pas favoriser l'éloignement des parents et des enfants, et la loi doit assurer la survie des relations parent-enfant en cas d'échec du mariage. Par conséquent, en plus de proposer une nouvelle terminologie pour remplacer l'expression «garde et droit de visite», le Comité conclut qu'il faudrait maintenir, dans la plupart des cas, le rôle de décideurs des parents après le divorce. Les membres espèrent que ce nouveau régime et cette nouvelle terminologie encourageront les parents à collaborer dans l'exercice de leurs responsabilités à l'égard de leurs enfants après la séparation, dans le meilleur intérêt des enfants, et qu'ils constateront que leurs arrangements, après la séparation, sont plus souples, plus naturels et plus bénéfiques pour tous les membres de la famille.

Le Comité conclut qu'il faut éliminer les termes «garde» et «accès» dans la *Loi sur le divorce* et les remplacer par l'expression «partage des responsabilités parentales». Il ne veut pas par là présumer qu'un

partage égal du temps, ou ce qu'on appelle couramment une garde physique conjointe, est dans le meilleur intérêt de l'enfant. Le Comité reconnaît que les ententes relatives au partage du temps et à la résidence peuvent varier d'une famille à l'autre. Au Canada, les familles confrontées à la séparation et au divorce aujourd'hui sont très différentes les unes des autres, de sorte qu'il serait, pour nombre d'entre elles, présomptueux et néfaste d'appliquer aux enfants du divorce une formule «universelle» d'ententes parentale. Par la nouvelle expression «partage des responsabilités parentales », le Comité entend réunir dans une même notion tous les droits et les responsabilités qui se retrouvent dans les deux termes existants, la garde et l'accès, et laisser aux parents et aux juges le soin de décider du partage.

Plusieurs autres recommandations découlent naturellement du changement de terminologie proposé. Il faudrait modifier la *Loi sur le divorce* pour supprimer la définition actuelle de garde et la remplacer par une définition de «partage des responsabilités parentales» au sens du présent rapport. Le Comité espère également que la nouvelle terminologie sera tôt ou tard intégrée dans les lois provinciales et territoriales sur la famille, pour que les enfants du Canada entier, que leur parents soient mariés ou non, bénéficient de ce nouveau régime en cas de séparation de leurs parents. Le gouvernement fédéral devrait promouvoir ce changement en participant au Comité fédéral-provincial-territorial sur le droit de la famille. De plus, en éliminant la notion de garde des enfants, la «doctrine du bas âge», vétuste et discréditée, n'est clairement plus utile et, pour éviter qu'elle exerce encore une influence, le Comité recommande son rejet.

Tout au long du rapport, et en particulier dans les recommandations, le Comité a utilisé l'expression proposée «partage des responsabilités parentales». Il n'a utilisé la terminologie actuelle que lorsqu'elle se rapporte à l'ancien régime de garde et d'accès. Bien sûr, quand un témoin est cité, il parle en général de garde et d'accès au sujet de questions réglées en vertu de l'actuel régime de la *Lois sur le divorce*. Lorsque le Comité emploie les expressions «partage des responsabilités parentales», «ordonnance de partage des responsabilités parentales» ou «modalités de partage des responsabilités parentales» dans une recommandation, ces expressions doivent être interprétées de la façon dont nous l'avons proposé.

En vertu du nouveau régime et de la nouvelle terminologie formulés par le Comité, les deux parents continueront, dans la plupart des cas après une séparation ou un divorce, à jouer à l'égard des enfants leurs rôles de décideurs comme avant la séparation. Pour s'assurer qu'aucun des deux parents ne soit injustement privé de l'exercice de ce rôle, le Comité recommande également que les autorités, par exemple les autorités scolaires et médicales, modifient la façon dont elles informent les parents. En cas de séparation ou de divorce, des renseignements importants au sujet du développement et du bien-être de l'enfant devraient être communiqués aux deux parents.

Recommandations

- 5. Le Comité recommande de ne plus employer les termes « garde » et « accès » dans la Loi sur le divorce et de les remplacer par l'expression « partage des responsabilités parentales », qui inclut non seulement le sens donné à ces deux termes, mais doit être interprétée comme englobant aussi toutes les significations, les droits, les obligations et les interprétations dont ils sont assortis.
- 6. Le Comité recommande qu'on modifie la *Loi sur le divorce* de manière à en supprimer la définition du terme « garde » et à y ajouter une définition de l'expression « partage des responsabilités parentales » dans le sens donné à cette dernière par le Comité.
- Le Comité recommande que le gouvernement fédéral travaille avec les gouvernements provinciaux et territoriaux à modifier dans le même sens la terminologie de leurs lois sur la famille.

- 8. Le Comité recommande que l'on rejette la « doctrine du bas âge » de la *Common Law* comme critère dans la prise de décision quant aux responsabilités parentales.
- 9. Le Comité recommande que les deux parents reçoivent l'information et les dossiers concernant le développement et les activités sociales de l'enfant, comme le dossier scolaire, le dossier médical et autres renseignements pertinents. Cette obligation devrait incomber non seulement aux deux parents, mais aussi aux écoles, aux médecins, aux hôpitaux et à tous ceux qui sont à la source de ces informations ou dossiers, à moins qu'un tribunal n'en décide autrement.

2. L'éducation des parents

De nombreux témoins ont dit au Comité qu'il serait possible de réduire les conflits entre conjoints qui divorcent si l'on donnait des cours aux parents immédiatement après la séparation. Ces témoins sont d'avis qu'une formation obligatoire à l'intention des parents les aiderait à mieux comprendre les effets du divorce sur les enfants et les dommages que peuvent causer aux enfants des conflits permanents. Ces cours, qui sont offerts de plus en plus dans toute l'Amérique du Nord, offrent l'espoir d'atténuer les effets négatifs du divorce sur les enfants. Certaines recherches préliminaires sur l'efficacité de ces programmes nous permettent d'être optimistes. Les témoins ont exhorté le Comité à recommander des recherches comparatives plus poussées afin d'identifier les programmes qui offrent le plus de potentiel.

Bon nombre de témoins ont fortement appuyé ce genre de formation. Des parents divorcés et des spécialistes de la santé mentale ont fait savoir qu'il faut donner aux conjoints l'occasion d'apprendre à quel point les conflits qui accompagnent si souvent les divorces peuvent faire du tort aux enfants. Les témoins ont également dit que des programmes d'éducation postérieurs au divorce aident les parents à voir les choses d'une autre manière et à acquérir les compétences nécessaires pour se comporter d'une façon plus appropriée avec leurs enfants.

Je suis persuadée que le divorce est une dure épreuve pour les enfants même quand on sait s'y prendre. C'est ma conviction. Il ne m'est jamais arrivé de rencontrer un cas où il n'y avait pas eu un préjudice quelconque. Les parents sont toutefois en mesure de minimiser les dégâts et ils doivent être conscients des torts qu'ils peuvent causer. Ils doivent être prêts à vouloir changer. Ils doivent comprendre ce qui arrive à leurs enfants et ils doivent être au courant des options possibles. Certains d'entre eux ne savent tout simplement pas quoi faire d'autre; ils agissent sous le coup de la colère, du ressentiment, de la douleur, de la culpabilité et de la peine et ils ne savent pas ce qu'ils peuvent faire d'autre. Une fois qu'ils ont compris qu'il y a d'autres solutions, ils sont presque toujours prêts à essayer autre chose. Ils peuvent voir la peine que cela cause à leurs enfants. (Jeanne Byron, avocate/éducatrice, réunion 26)

Il faut arriver à bien faire comprendre l'incidence d'une exposition prolongée à des niveaux élevés de conflit sur les enfants, et sur tous les autres membres de la famille, non seulement parce que c'est difficile pour les enfants, mais aussi parce que cela crée chez les parents des tensions qui nuisent à leur vie personnelle et à leurs compétences parentales. (Orysia Kostiuk, Programme d'éducation des parents du Manitoba, réunion 26)

Plusieurs témoins ont donné des détails sur l'efficacité des programmes d'éducation des parents offerts dans leur collectivité. En Alberta, un programme intitulé *Parenting After Separation* est devenu obligatoire — les parents doivent assister à un cours avant même de présenter une demande de divorce. Dans d'autres régions du pays, des organismes de services sociaux, des groupes communautaires, des cliniques de

droit de la famille et au moins un cabinet d'avocat offrent de tels programmes²⁷. Le Comité a appris qu'en Floride, les enfants aussi doivent suivre un programme d'éducation sur le divorce avant que leurs parents puissent présenter une demande devant les tribunaux²⁸.

Les programmes d'éducation des parents fournissent aux participants des renseignements généraux sur la séparation et le divorce, les procédures judiciaires et d'autres questions auxquelles ils seront confrontés comme parents, ainsi que sur les effets de la transition sur leurs enfants. Certains programmes vont plus loin, initiant les parents aux techniques parentales permettant d'éviter le plus possible aux enfants d'être exposés à un conflit parental. La recherche américaine sur l'efficacité des programmes d'éducation des parents, quoique naissante, a produit des résultats confirmant que ces programmes sont utiles pour assurer le mieux-être des enfants touchés par une séparation ou un divorce.

La recherche sur les programmes américains d'éducation des parents a révélé les résultats positifs suivants :

- les participants sont plus positifs quand ils parlent de leur conjoint à leurs enfants et les parents non résidants voient davantage leurs enfants²⁹;
- les parents améliorent leur capacité de communiquer³⁰; et
- les programmes réduisent l'exposition des enfants aux conflits parentaux et augmente la tolérance de chaque parent face au rôle de parent du conjoint³¹.

Même si les programmes ont des contenus très variables, la plupart mettent l'accent sur les réactions des parents et des enfants après le divorce, les besoins de l'enfant selon son âge en matière de développement et les avantages de la collaboration des parents après le divorce. On insiste sur l'impact du divorce sur les enfants et sur les comportements que les parents devraient adopter pour favoriser le bien-être de leurs enfants. Les questions juridiques sont aussi abordées. Dans la plupart des régions où on oblige les parents à suivre une formation, par exemple en Alberta, des programmes spéciaux sont offerts aux victimes de violence familiale.

Médiation familiale Canada, appuyée par Santé Canada, a récemment produit un répertoire des programmes canadiens d'éducation des parents et des ressources qui y sont affectées, intitulé Families in Transition: Children of Separation and divorce. Cet ouvrage est un répertoire de tous les programmes d'éducation des parents, facultatifs et obligatoires, offerts partout au Canada. Y sont répertoriés plus de 140 programmes de toutes les provinces, ainsi qu'une vaste gamme de vidéos, livres et autres ressources que les parents et les personnes prêtes à les aider peuvent consulter. Il en ressort que les programmes facultatifs d'éducation des parents offrent des formules et des contenus très variés, et sont très faciles d'accès.

M. Rob Huston, qui a témoigné à Calgary, a parlé de sa propre expérience positive relativement au programme d'éducation des parents après la séparation (*Parenting After Separation*). En effet, grâce à ce programme, lui-même et la mère de son enfant collaborent avec bonheur à l'éducation de leur fils.

²⁷ Reierson Sealy, à Halifax (Nouvelle-Écosse).

M. Gary Newman, Helping Your Kids Cope with Divorce the Sandcastles™ Way (Random House, 1998).

Jack Arbuthnot, Cindy Poole et Donald Gordon, "Use of Educational Meterials to Modify Stressful Behaviors in Post-Divorce Parenting", Journal of Divorce and Remarriage, vol. 25, 1/2 (1996), p. 117.

Jack Arbuthnot et Donald Gordon, "Does Mandatory Divorce Education for Parents Work?" Family and Conciliation Courts Review, vol. 34, no 1, (janvier 1996), p. 60.

³¹ Jack Arbuthnot, Presentation à la conférence de, Médiation familiale Canada 1996, Winnipeg, (Manitoba), citée par Jeanne Byron, 13 mai 1998.

Je suis très fier que le programme ait fonctionné. Je fais la promotion du programme de partage des responsabilités parentales après la séparation. Pourquoi me direz-vous? Parce qu'il faut apporter des changements et qu'il faut changer la mentalité des autres parents. (Réunion 20, Calgary)

Recommandation

10. Le Comité recommande, que exception faite des cas où les deux parents se sont entendus au préalable, tous les parents qui font une demande d'ordonnance parentale soient tenus de participer à un programme d'éducation qui les aidera à mieux comprendre la manière dont parents et enfants réagissent au divorce, les besoins des enfants à diverses étapes de leur développement, les avantages qu'il y a à s'entendre sur l'exercice du rôle parental après le divorce, les droits et les responsabilités des parents, de même que la disponibilité de services de médiation ou d'autres mécanismes de résolution des conflits et les avantages d'y avoir recours s'ils existent. On exigerait des parents un certificat attestant de leur présence aux séances de ce programme d'éducation postséparation comme condition préalable à la présentation de leur demande d'ordonnance. Les parents ne devraient pas être obligés d'assister aux séances ensemble.

D. L'exercice conjoint des responsabilités parentales et les ententes parentales

Des groupes de pères et des pères ont demandé au Comité d'envisager la possibilité de recommander une règle générale implicite en faveur de l'exercice conjoint du rôle parental ou de la garde partagée. Selon eux, c'est la seule façon de garantir que les deux parents négocient ou participent à la médiation en toute bonne foi et ne perdent pas de vue l'intérêt des enfants. Sans cette règle générale implicite, ces témoins estiment que les mères, très souvent, ne participeraient pas à la médiation et que la discrimination selon le sexe perçu dans les tribunaux perpétuerait la prédominance de la garde par la mère. Bien que le Comité n'a pas recommandé l'établissement d'une règle générale implicite en faveur de l'un ou l'autre des parents ou d'un régime de soins parentaux particulier, il constate l'importance d'un partage essentiellement égal des décisions, voire du temps parental, là où cette formule se prête bien. Dans le cas des parents dont les ressources émotionnelles et financières leur permettent d'opter pour des modalités de garde physique conjointe. Le Comité estime que ces modalités ne peuvent qu'encourager une véritable participation des deux parents à la vie de leurs enfants.

Le Comité a entendu les témoignages de psychologues et de travailleurs sociaux pour qui il est dans l'intérêt de l'enfant d'entretenir des relations avec ses deux parents après le divorce. Ces impressions cliniques sont appuyées par de nombreuses études qui révèlent que le développement émotif de l'enfant est favorisé par le maintien de liens avec les deux parents après le divorce. Les parents à qui l'on refuse de jouer un rôle important dans la vie de leur enfant ont tendance à se retirer progressivement, et ce, au détriment de l'enfant. En s'assurant que chacun des parents a un rôle important dans le soin des enfants et dans la prise de décisions, comme ce serait le cas dans le nouveau régime proposé par le Comité, on peut maximiser sa participation à la vie de l'enfant.

M. John Service, directeur administratif de la Société canadienne de psychologie, a affirmé que «[l]es meilleures solutions sont bien sûr celles qui rendent l'expérience de la séparation et du divorce moins traumatisante. Des ententes généreuses de garde et de visite sont le plus souvent dans le meilleur intérêt des enfants et des parents.» (Réunion 18)

Mme Ester Birenzweig, du programme Families in Transition, a dit que

[...] les enfants que nous voyons dans notre pratique et qui semblent être les plus confiants vivent généralement une situation où le conflit entre les parents est minimisée. L'enfant est alors convaincu que ses parents l'aiment et qu'il peut compter sur eux, peu importe où se trouve l'un de ses parents et avec quelle fréquence il voit l'enfant. (Réunion 17)

Les divers groupes de défense des droits des pères d'un bout à l'autre du Canada appuient tous l'idée d'une règle générale implicite en faveur de la garde conjointe. M. Malcolm Mansfield, du groupe Fathers Are Capable Too (FACT), résume la pensée de la plupart des groupes de défense des droits des hommes qui ont témoigné :

Le partage des responsabilités parentales crée une situation où il n'y a pas de perdant. Les enfants continuent à vivre avec leurs deux parents et à profiter de leur amour et de leurs soins. Lorsqu'il y a un divorce, les enfants ont encore plus besoin de l'affection, de l'amour et des conseils de leurs deux parents. Lorsqu'ils sont privés de l'un de leurs parents, ils ressentent de l'insécurité, laquelle est source de stress. [...] J'aimerais vous convaincre aujourd'hui qu'on devrait partir du principe que les deux parents doivent participer à l'éducation des enfants. Lorsque la garde de l'enfant est accordée à un seul parent et que le père de l'enfant est relégué au rôle de papa-gâteau ou de papa-Disneyland, c'est l'enfant qui perd. [...] Les enfants ne souffrent pas du fait d'avoir trop d'attention de leurs parents. Ils ont besoin d'autant d'amour et d'affection que possible des deux parents. (Malcolm Mansfield, FACT, réunion 7)

Des groupes de mères et de femmes ont averti le Comité qu'une règle générale implicite en faveur de la garde conjointe pourrait mener à son imposition dans des cas non appropriés. Dans bien des cas disent-ils, la formule de la garde conjointe pourrait permettre à un père abusif de continuer de harceler sa femme et ses enfants. Ces témoins ont également affirmé que le principal enjeu, ce n'est pas la garde conjointe; bien des pères abandonnent leurs familles et ne se prévalent pas des droits de visite qu'ils ont déjà à l'égard de leurs enfants.

Comme nous l'expliquons au chapitre 4, le Comité est convaincu qu'il n'est pas dans l'intérêt des enfants de créer une règle juridique implicite en faveur de la mère ou du père ni en faveur de modalités particulières d'exercice du rôle de parent. Dans ce même chapitre, le Comité recommande qu'on ajoute à la *Loi sur le divorce* une série de critères qui aideront à définir en quoi consiste l'intérêt de l'enfant; on retrouverait, parmi ces critères, le principe selon lequel les enfants ont avantage à pouvoir entretenir des relations suivies et significatives avec leur père et leur mère, sauf dans les cas exceptionnels où il y a eu violence et où la violence présente toujours un risque pour l'enfant. Il déterminerait au cas par cas si un partage égal du temps parental est dans l'intérêt d'un enfant en particulier, moyennant une évaluation complète des circonstances de l'enfant et de ses parents.

Lorsque les parents consentent à des arrangements comportant un partage relativement égal du temps parental, avec l'aide d'un conseiller ou d'un médiateur, ces modalités sont souvent expliquées en détail dans les ententes parentales. Ces dispositions sont plus détaillées que l'entente ou l'ordonnance traditionnelle de séparation à laquelle doivent se plier beaucoup de couples. Elles précisent le lieu où l'enfant habitera pendant l'année, comment les parents se partageront la prise des décisions et la façon dont ils s'y prendront pour régler toute dispute qui pourrait surgir entre eux. Les ententes parentales ne sont prévus dans aucune loi canadienne sur la garde des enfants et le droit de visite, mais ils sont très répandus dans les milieux thérapeutiques ou de négociation, comme outil pour aider les parents à prendre des décisions concernant l'éducation de leurs enfants.

Des avocats, des thérapeutes et des médiateurs ont expliqué les avantages de cet outil au Comité. Les ententes parentales permettent aux parents de s'éloigner des étiquettes (« c'est moi qui ai la garde, et toi tu n'as qu'un droit de visite ») pour se concentrer sur l'emploi du temps de l'enfant, ses activités et ses véritables besoins. Le Comité reconnaît l'utilité de ces ententes comme outils de prise de décisions. Il encourage les parents en instance de divorce et les professionnels qui travaillent avec eux à établir de telles ententes et conclut que toutes les ordonnances de partage des responsabilités parentales devraient être présentées sous la forme de plans parentaux. Conscient des inconvénients inhérents à la longueur des formulaires obligatoires à l'élaboration d'une entente (comme ceux qu'il faut remplir dans l'État de Washington), le Comité demande au ministre de la Justice de s'assurer que, dans l'application de ces recommandations, les formulaires soient suffisamment courts et simples à remplir pour être utiles et à la portée des parents ainsi que des professionnels chargés de les aider.

Les ententes parentales, surtout s'ils sont négociés directement entre les parents ou avec l'aide d'un médiateur, sont adaptés aux besoins d'un enfant ou d'une famille en particulier et ont aussi l'avantage d'être souples. Ils tiennent compte des activités et de l'emploi du temps de l'enfant, mais peuvent aussi constituer un dossier utile à mesure que l'enfant grandit et que ses besoins et ses intérêts changent. Les ententes peuvent tenir compte d'autres personnes qui sont importantes dans la vie de l'enfant : par exemple, on peut prévoir des moments pour les grands-parents ou d'autres parents plus éloignés, ou préciser que ces contacts sont importants et qu'ils seront facilités par les parents. Évidemment, de telles dispositions ne s'appliqueraient pas si ces contacts étaient jugés contraires au meilleur intérêt de l'enfant. En plus d'établir un mécanisme de résolution des conflits auquel les parents auront recours en cas d'impasse, les ententes parentales devraient préciser quand et comment les parents en reverront les modalités à mesure que l'enfant grandit.

Il peut arriver que les parents ne puissent convenir d'une entente parentale entre eux ou avec l'aide d'un médiateur. Dans un tel cas, les parents pourront faire une demande de modalités de partage des responsabilités parentales en vertu de la *Loi sur le divorce*. Les juges chargés d'établir ces modalités pourront tenir compter du plan parental déposé devant le tribunal par chaque parent et rendre, « dans l'intérêt supérieur de l'enfant » une ordonnance sous la forme d'une entente parentale. Cette entente, quoique imposé par la loi, aura l'avantage de tenir compte des besoins et des intérêts de l'enfant tout en étant souple et adaptable.

Recommandations

- 11. Le Comité recommande que l'on encourage les parents qui divorcent à élaborer, eux-mêmes ou avec l'aide d'un médiateur compétent ou encore par l'intermédiaire d'un autre mécanisme de résolution des conflits, une entente parentale qui détaillera les responsabilités de chacun des parents à l'égard des enfants en ce qui concerne la résidence, les soins, le processus de prise de décisions et leur sécurité financière, de même que le mécanisme de résolution des conflits auquel les parties doivent recourir. Les ententes parentales doivent aussi obliger les parents à partager entre eux les renseignements concernant la santé de l'enfant, ses études et toute autre information liée à son développement et ses activités sociales. Toutes les ordonnances devraient se présenter sous la forme d'entente parentales.
- 12. Le Comité recommande que l'importance des relations entre les enfants et leurs grands-parents, leurs frères et soeurs et les autres membres de la famille élargie soit reconnue, et que des dispositions visant à maintenir et à encourager ces relations soient incluses dans les ententes parentales, pourvu qu'elles soient dans l'intérêt de l'enfant.
- 13. Le Comité recommande que le ministère de la Justice cherche à modifier la *Loi sur le divorce* de manière à y exiger que les parties demandant une ordonnance parentale à un tribunal soient tenues de présenter au tribunal un projet d'entente parentale.

E. Les mécanismes non accusatoires de résolution des conflits

Le Comité a entendu de nombreux témoignages sur l'efficacité de la médiation et d'autres modes de règlement extrajudiciaire des conflits comme moyens d'aider les parents à prendre des dispositions concernant leurs enfants après le divorce. Des experts de la médiation de partout au Canada ont parlé de l'importance de promouvoir ce mode non accusatoire de règlement des conflits pour aider les familles à se remettre après le divorce. Les avantages de la médiation et des autres mécanismes de règlement extrajudiciaire des conflits sont les suivants : l'atténuation plutôt que l'exacerbation des tensions et des conflits entre les parents en instance de divorce et la réduction des dépenses; et la possibilité qu'offrent ces moyens de faire en sorte que les enfants et d'autres personnes intéressées participent plus facilement que ce n'est le cas dans une procédure judiciaire. La médiation est de plus en plus répandue dans le monde comme instrument de prise de décisions en matière de responsabilités parentales après la séparation ou le divorce. En effet, en Australie, le *Family Law Reform Act* de 1995 propose la médiation et l'arbitrage comme «première solution aux conflits» avant de passer aux procédures judiciaires qui devraient être considérées comme une « solution de second recours ».

Au Québec, la loi oblige les parents en instance de divorce à assister à au moins une séance d'information sur les avantages de la médiation. S'ils décident d'opter pour cette formule, le gouvernement provincial leur paiera jusqu'à six séances. La loi du Québec permet aussi aux parties dans certains cas, par exemple lorsqu'il y a risque ou antécédents de violence familiale, de se désister (y compris des séances d'information) en signant un formulaire d'autorisation qui sera envoyé au tribunal.

Les groupes de défense des droits des femmes et certains médiateurs ont exprimé des réserves à l'égard de la médiation dans les cas d'abus. Ils estiment que le conjoint abusif pourrait se servir des séances de médiation pour harceler ou dominer l'autre membre du couple. Ils ont dit aussi qu'étant donné que la violence est répandue dans les familles canadiennes, la médiation obligatoire mettrait bien des femmes et des enfants en danger.

En règle générale, la médiation n'est pas non plus indiquée dans les cas de violence. En effet, ces cas se caractérisent généralement par un pouvoir de négociation inégale, et il existe toujours un risque de violence supplémentaire pendant le processus de médiation. (Martha Bailey, Faculté de droit de l'Université Queen's, réunion 11)

Les médiateurs qui ont témoigné estiment qu'on doit s'éloigner de la formule accusatoire dans les situations de divorce. Howard Irving a dit ceci :

Au cours de la dernière décennie, on a de plus en plus été amené à remettre en question la procédure contradictoire du système judiciaire, surtout en ce qui concerne les différends familiaux. Toutefois, la communication et la coopération qui sont nécessaires pour que les deux membres d'un couple séparé continuent d'assumer leurs responsabilités parentales sont plus difficiles à obtenir dans un système contradictoire. En effet, bien souvent, on se heurte à de grandes difficultés en droit de la famille parce que les problèmes qu'il s'agit de résoudre ne sont pas exclusivement de nature juridique mais de nature humaine. S'il est vrai qu'il y a quand même des problèmes d'ordre juridique à résoudre, cela n'atténue pas les problèmes humains et, ce qui est encore plus important pour. l'avocat, il est rare que le problème juridique puisse être réglé correctement tant que les problèmes humains ne l'ont pas été. Dans le contexte contradictoire, la procédure de divorce, qui est axée sur la faute, la rétorsion, la victoire ou la défaite, n'offre aucun avantage réel aux parties. Les batailles juridiques engagées au sujet des relations humaines ne permettent pas d'établir un climat sain ou juste pour les parents qui divorcent et pour leurs enfants. (Howard Irving, Faculté de travail social de l'Université de Toronto, réunion 11)

Recommandation

14. Le Comité recommande que les parents qui divorcent soient encouragés à assister à au moins une séance de médiation ce qui les aidera à élaborer une parentales pour leurs enfants. En raison de l'impact de la violence familiale sur les enfants, il y aurait lieu de structurer la médiation et les autres mécanismes décisionnels hors-instance de telle sorte qu'on puisse y déceler et identifier les cas de violence familiale. Lorsque, dans une famille, il y a des antécédents évidents de violence d'un parent envers l'autre ou envers les enfants, on ne devrait utiliser d'autres mécanismes de résolution des conflits pour élaborer l'entente parentale qu'une fois assurée la sécurité de la victime de la violence et éliminé le risque de violence. Dans ce cas, l'entente parentale doit être axé sur les responsabilités des parents à l'égard des enfants et comporter des mesures précises pour garantir la sécurité et la protection des parents et des enfants.

F. Élargir le cercle : Faire participer d'autres personnes

Les enfants dont les parents sont sur le point de se séparer se sentent souvent isolés et impuissants. Un certain nombre de témoins, notamment de professionnels de la santé mentale, d'enfants, de grands-parents et autres membres de la famille élargie, ont parlé des moyens d'inclure d'autres personnes dans le processus de divorce à titre de soutiens, de personnes-ressources, de défenseurs ou d'intermédiaires qui parleraient au nom des enfants. Bien entendu, certaines familles recourent elles-mêmes à des thérapeutes professionnels pour aider leurs enfants, d'autres n'en ont pas besoin, mais beaucoup ne savent pas à quel point elles pourraient profiter de l'expérience de conseillers spécialisés dans la dynamique de la séparation et ses répercussions sur les enfants.

Le Comité a écouté avec intérêt le témoignage de personnes-ressources qui jouent déjà dans la société le rôle de soutien aux enfants; il s'agit souvent des grands-parents ou d'autres membres de la famille élargie. Le Comité reconnaît l'importance de ce type de soutien dans la recommandation 3, où il propose de donner aux juges le pouvoir de nommer des membres de la famille ou d'autres personnes concernées pour soutenir l'enfant pendant le divorce. Ces tierces parties pourraient apporter une aide précieuse à l'enfant qui s'ouffre de la séparation ou du divorce de ses parents, voire le représenter devant les tribunaux.

Il faut que le droit reconnaisse l'importance des relations que nous entretenons avec les enfants pour leur développement harmonieux. Il faut utiliser les services des grands-parents; ils peuvent servir de soutien partiel et peuvent également accueillir les jeunes, en particulier les petits-enfants qui sont signalés aux services sociaux. (Annette Bruce, Orphaned Grandparents Association, réunion 20, Calgary)

Dans toutes les régions du Canada, les grands-parents ont témoigné devant le Comité et ont demandé que leurs relations avec leurs petits-enfants soient respectées dans la loi après le divorce des parents. Le Comité a entendu beaucoup de cas douloureux où le divorce avait mis fin à des rapports étroits et affectueux entre grands-parents et petits-enfants. Ces témoins ont également fait remarquer que les grands-parents sont souvent le lien entre l'enfant et son patrimoine et que l'on devrait tenir compte de cette réalité dans la loi.

Certaines études ont révélé que les grands-parents offrent souvent un gîte temporaire aux enfants pendant que leurs parents se disputent leur garde et le droit de visite. Une enquête effectuée à Toronto en 1990 a révélé que, parmi les cas signalés à la clinique de droit de la famille, le tiers des parents et les trois quarts des

enfants avaient habité chez un des grands-parents pendant ou après la séparation³².

À l'heure actuelle, quelques provinces convoquent d'office les grands-parents aux audiences relatives à la garde des enfants et au droit de visite. Il est amplement question au chapitre 4 de la situation législative et de la possibilité de procéder à une réforme juridique en ce qui concerne le droit des grands-parents de demander la garde des enfants ou un droit de visite. Il faut signaler que les groupes de défense des droits des grands-parents ne demandent pas un statut égal à celui des parents en ce qui concerne la garde et le droit de visite. Ils demandent simplement que le tribunal respecte les rapports spéciaux et importants que les grands-parents ont avec leurs petits-enfants et que l'accès aux enfants leur soit facilité.

Pourquoi les grands-parents devraient-ils avoir un droit de visite? Il est bien connu qu'entre les jeunes et les vieux, il existe des affinités et que le courant passe; cela est particulièrement vrai en ce qui concerne les petits-enfants et leurs grands-parents. Un des nombreux avantages que les enfants tirent de leurs relations avec leurs grands-parents est le soutien affectif qu'ils trouvent dans un environnement stable et sûr, ce qui est de la plus haute importance. Souvent, il faut ajouter à cela un soutien financier. Les grands-parents offrent un amour sans condition, et sans compter, et tendent une oreille attentive aux craintes, aux frustrations et aux besoins des enfants. (Irma Luyken, section de Waterloo, Association to Reunite Grandparents and Families, réunion 9)

Le Comité encourage aussi les parents qui envisagent de se séparer ou de divorcer de se prévaloir des ressources offertes dans leur collectivité et de l'abondante documentation qu'ils peuvent trouver dans les librairies ou les bibliothèques, afin d'être mieux armés pour trouver des solutions optimales pour leurs enfants. Vu le nombre de familles qui vivent une séparation ou un divorce au Canada et en Occident en général, aucune famille — ni aucun enfant — ne devrait avoir l'impression qu'elle est seule à vivre les bouleversements du divorce.

³² C. Wilks et C. Melville, "Grandparents in Custody and Access Disputes", Journal of Divorce, vol. 1 (1990), cité par Jeanette Mather, membre honoraire de la G.R.A.N.D. Society, section d'Ottawa, réunion 9.

Chapitre 3: Autres modèles

Comme il reconnaît que les Canadiens ne sont pas les seuls à vouloir améliorer le processus de prise de décisions au sujet des dispositions parentales après le divorce, le Comité s'est penché sur les lois et les pratiques qui existent en matière de garde des enfants et de droit de visite dans plusieurs entités administratives à l'extérieur du Canada. Certains de ces exemples ont été fournis par des témoins. Le Comité a choisi de passer en revue quatre modèles de l'étranger dont ont parlé des experts qui travaillent dans ces régions du monde : l'Australie, le Royaume-Uni ainsi que les États du Michigan et de Washington.

Australie

La réforme la plus importante en matière de droit de la famille en Australie depuis 1975 est l'adoption du Family Law Reform Act 1995 (appelé «Reform Act »), dont la plus grande partie est entrée en vigueur le 11 juin 1996. Cette loi venait modifier le Family Law Act 1995 et introduisait les nouvelles notions de « responsabilités parentales », de « résidence » et d'ordonnances relatives aux « contacts », qui remplaçaient les anciens concepts de tutelle, de garde et de droit de visite. Ces changements de terminologie s'inspirent du Children Act 1999, adopté au Royaume-Uni. Mme Regina Graycar, professeur de droit à l'Université de Sydney, s'est adressée au Comité en ces termes :

On semble généralement convenir que les objectifs qui ont été adoptés émanaient en grande partie d'une analyse de la loi britannique. Il s'agissait en gros d'encourager les parents à continuer de s'occuper de leurs enfants après la séparation, de réduire les litiges entre les parents en éliminant la notion de gain absolu que certaines personnes associent aux dispositions de garde et d'accès; de privilégier les droits des enfants par rapport aux besoins ou droits des parents; de favoriser la négociation d'ententes privées et d'accroître le recours à ce qu'on appelle aujourd'hui « la résolution primaire des différends » — nous avons aboli l'adjectif « alternative » et il s'agit maintenant du mécanisme principal de résolution; et, finalement, de veiller à ce qu'il n'y ait aucun risque de violence pendant les contacts ou l'accès et de faire en sorte que la violence soit prise en compte pour déterminer les meilleurs intérêts des enfants. (Réunion 35)

Le Reform Act renferme un énoncé des objectifs et des principes de la Convention des Nations Unies relative aux droits de l'enfant. On y remplace également les concepts juridiques de garde et de tutelle par celui de « responsabilités parentales ». Les deux parents ont la responsabilité de leurs enfants et ils ne la perdent pas même si la nature de leurs relations change. Chacun des parents peut exercer toute la gamme des responsabilités parentales indépendamment de l'autre, à moins qu'une « ordonnance relative à des questions précises » n'apporte des restrictions particulières. Les responsabilités parentales sont définies comme tous les devoirs, pouvoirs, responsabilités et autorité qui reviennent de droit aux parents lorsqu'il s'agit de leurs enfants³³.

La notion de responsabilités parentales englobe les types de devoirs qui sont compris dans la notion de garde ainsi que des questions comme la discipline, la religion, l'éducation, les traitements médicaux, la propriété et l'identité de l'enfant. Ces devoirs ne sont pas énumérés dans la loi. Un parent peut être exclu de l'exercice des responsabilités parentales en général ou encore d'un aspect particulier de celles-ci au moyen

³³ Family Law Reform Act 1995, no 167 de 1995, ART. 31, paragraphe 61B.

d'une « ordonnance relative à des questions précises »³⁴. Outre les ordonnances relatives à des questions précises, le *Reform Act* porte création de trois autres types d'ordonnances parentales qui peuvent être rendues par le tribunal :

- (1) les ordonnances relatives à la résidence qui traitent de l'endroit où l'enfant résidera;
- (2) les ordonnances relatives aux contacts qui précisent quand l'enfant sera avec son autre parent;
- (3) les ordonnances relatives aux soins donnés à l'enfant.

Le professeur Graycar a aussi renseigné le Comité sur les résultats préliminaires de sa recherche qu'elle est en train de faire avec le Tribunal de la famille d'Australie, pour évaluer les effets de ces modifications législatives. À ce stade-ci, il existe une diversité d'opinions au sujet de l'impact réel du nouveau vocabulaire de la loi sur les arrangements concernant les responsabilités parentales après le divorce, mais rien ne semble indiquer jusqu'à maintenant que les parents qui n'habitent pas avec leurs enfants passent plus de temps avec eux. Par contre, les tribunaux ont peut-être accordé plus souvent un droit de visite à des parents à qui ils l'auraient refusé précédemment. Par ailleurs, les changements législatifs se sont produits en même temps qu'une diminution importante de l'aide juridique civile disponible, et les chercheurs ont du mal à départager les effets de ce changement et ceux de la réforme législative.

Le système australien diffère de celui implanté dans plusieurs autres pays sur lesquels s'est penché le Comité, notamment le Canada, car il n'y a qu'un seul tribunal national du droit de la famille auquel vient se greffer un vaste réseau de ressources thérapeutiques. Les conseillers affiliés au tribunal offrent leurs services au public à des tarifs relativement bas et, comme l'a mentionné le professeur Graycar, ils sont particulièrement efficaces dans les cas de conflits entre parents, par exemple en ce qui concerne l'exercice ou le refus du droit de visite. Lorsque l'on compare les nouvelles lois sur la famille de l'Australie et du Royaume-Uni, on mentionne souvent comme principale différence la présence des services non juridiques du tribunal de la famille.

Royaume-Uni

Le Children Act 1989 du Royaume-Uni est une loi exhaustive qui rassemble et simplifie plusieurs lois concernant les enfants. Il régit les questions touchant la garde privée des enfants et le droit de visite, la protection de l'enfant et d'autres obligations publiques à l'égard des enfants. Cette loi vise à atteindre l'équilibre entre l'autonomie familiale et la protection des enfants³⁵. Elle part du principe que les parents sont les mieux placés pour subvenir aux besoins de leurs enfants, et qu'il est préférable que les tribunaux ne s'en mêlent pas ou du moins très peu. On définit le nouveau concept des « responsabilités parentales » comme l'ensemble des divers droits, devoirs, pouvoirs, responsabilités et autorité qu'exerce un parent à l'égard de son enfant³⁶. En Australie comme au Royaume-Uni, les responsabilités parentales continuent d'exister quelle que soit la nature des rapports entre les parents. Contrairement à la loi australienne toutefois, celle du Royaume-Uni mentionne les « droits » des parents.

Janet Walker, du Relate Centre en Angleterre, qui est aussi membre du conseil d'administration de l'Institut canadien de recherche sur le droit et la famille, a expliqué au Comité la notion de responsabilité parentale :

³⁴ Paragraphe 61C.

³⁵ Ministère de la Santé du R.-U., An Introduction to the Children Act 1989 (Londres: HMSO, 1989), p. iii.

³⁶ Children Act 1989 (1989, chap. 41), article 3.

Le terme que nous utilisons est « responsabilité parentale conjointe » et, au moment de la séparation ou du divorce, puisque, naturellement, cela s'applique aux parents non mariés comme à ceux qui sont mariés et qui divorcent, on rappelle aux parents en quoi consistent leurs responsabilités parentales conjointes et on s'attend à ce qu'ils se consultent vraiment, chaque fois qu'il faut prendre des décisions qui affectent la vie de l'enfant. Néanmoins, nous croyons que la responsabilité de la prise de décision pour les questions routinières suit l'enfant. Ainsi, chaque fois que l'enfant se trouve avec sa mère, celle-ci est responsable des décisions quotidiennes. Lorsque l'enfant est avec le père, c'est le père qui décide. Les décisions importantes sont censées être débattues conjointement. (Réunion 20, Calgary)

L'adoption des concepts de responsabilité parentale, devait mener à un changement d'attitude, de sorte que les parents ne verraient plus l'exercice du rôle parental sous l'angle de leurs droits, mais plutôt comme un privilège assorti d'obligations. On espérait ainsi atténuer le caractère compétitif de la notion de « gain absolu » dans les conflits. Le modèle législatif du Royaume-Uni présente une différence : il est clair dans le texte qu'un parent peut exercer unilatéralement les responsabilités parentales sans consulter l'autre, tant et aussi longtemps qu'elle ne contrevient pas à une ordonnance du tribunal³⁷. Mme Janet Walker a parlé des avantages de la nouvelle terminologie.

Il y a, actuellement en Angleterre, beaucoup de résultats de recherche à propos des changements que nous avons apportés aux politiques afin d'aider les parents à faire face aux difficultés de ce que nous appelons maintenant « résidence et contact ». Je pense que nous avons assez bien réussi à désamorcer les batailles et les disputes par la voie législative. (Réunion 20)

Le Children Act 1989 prévoit des ordonnances relatives aux responsabilités parentales, notamment des « ordonnances relatives à ux contacts », des « ordonnances relatives à la résidence », des « ordonnances relatives à des questions précises » et des « ordonnances relatives aux mesures interdites ». Dans ce dernier cas, il s'agit d'ordonnances qui interdisent que l'un ou l'autre des parents ne prenne quelque mesure que ce soit pour exercer ses responsabilités parentales à l'égard de son enfant sans le consentement du tribunal³⁸. La loi exprime une préférence marquée pour les ordonnances de type moins interventionniste. La prise d'ordonnances relatives à des questions précises et aux mesures interdites est limitée dans l'article 9(5) de la loi aux cas où l'on pourrait obtenir le même résultat en rendant une ordonnance concernant la résidence ou des contacts. En plus de restreindre le pouvoir du tribunal en matière d'ordonnances concernant les responsabilités parentales, l'article 1(5) prescrit qu'il ne doit rendre une ordonnance que s'il peut démontrer que cela serait plus dans l'intérêt de l'enfant que s'il n'en rendait pas.

L'État du Michigan

En vertu du *Child Custody Act of 1970* de l'État du Michigan, les questions touchant la garde des enfants et le temps consacré aux enfants, ou «parenting time», (l'équivalent de la notion d'« accès » dans la *Loi sur le divorce*) doivent être réglées dans l'intérêt de l'enfant³⁹. On énumère à l'article 3 de la loi une série de facteurs dont le tribunal doit tenir compte pour déterminer l'intérêt de l'enfant, notamment certains des mêmes critères qui sont utilisés dans certaines lois provinciales sur la famille et dans la jurisprudence canadienne, par exemple : les liens émotifs entre l'enfant et les parties; la période pendant laquelle l'enfant a vécu dans un milieu stable, la préférence de l'enfant, s'il est assez âgé pour l'exprimer; et la volonté des parties de faciliter des liens étroits entre l'enfant et l'autre parent. Il faut également tenir compte de la présence de violence dans la famille, que l'enfant en ait été victime lui-même ou simplement témoin.

³⁷ Children Act 1989, par. 2(7).

³⁸ Article 8, Children Act 1989.

³⁹ Child Custody Act of 1970, MCL ACT.1970.91, 722.25, article 5.

La loi du Michigan encourage les parents à envisager la garde conjointe dans les ententes parentales et exige que les parents soient mis au courant de l'option de la garde conjointe s'il y a conflit entre eux au sujet de la garde⁴⁰. Si l'un ou l'autre des parents demande la garde conjointe, le tribunal doit le prendre en considération et verser au dossier les raisons pour lesquelles il a décidé de l'accorder ou de la refuser. Pour décider s'il accordera la garde conjointe légale ou physique, le tribunal doit tenir compte des critères relatifs à l'intérêt de l'enfant, dont il est qui sont énoncés à l'article 3, et déterminer si les parents pourront collaborer à la prise de décisions au sujet de l'enfant. Lorsque le tribunal accorde la garde conjointe, chacun des parents est responsable des décisions quotidiennes pendant que l'enfant habite avec lui.

En plus d'accorder la garde à l'un des parents ou aux deux, le tribunal peut prévoir une période raisonnable pendant laquelle l'enfant passera du temps avec ses parents, ses grands-parents ou d'autres personnes. Ces périodes seront déterminées selon une formule qui est dans l'intérêt de l'enfant, même si l'on présume que l'enfant a avantage à entretenir des liens étroits avec ses deux parents⁴¹. De plus, l'article en question range au titre des droits de l'enfant le temps qu'il passe avec chacun de ses parents, à moins qu'il n'existe de preuves claires et convaincantes que sa présence auprès d'eux mettrait en danger sa santé physique, mentale ou émotionnelle.

Dernièrement, après de longues audiences publiques sur la législation concernant la garde des enfants, le Michigan a modifié son approche. Les audiences ont donné lieu à très peu voire pas de consensus sur les améliorations à apporter. Le Michigan a fusionné les instances judiciaires dans les domaines du droit du divorce et du droit des jeunes délinquants et créé la Division de la famille de la Cour de circuit du Michigan. Cette dernière a été créée par l'Assemblée législative de l'État en 1996 et est entrée en fonction le 1^{er} janvier 1998. Aux termes de la loi, chaque comté de l'État est libre d'élaborer à sa manière les modalités de fonctionnement du tribunal de la famille.

Le juge John Kirkendall, de la cour de première instance d'Ann Arbor, comté de Washtenaw, au Michigan, décrit les avantages que le tribunal unifié présente pour les couples en instance de divorce et leurs enfants.

Depuis deux ans que [la Division de la famille existe à la Cour de circuit], nous avons appris certaines choses. Par exemple, nous savons que nous pouvons régler certaines questions familiales de manière plus efficace, plus informée et plus rapide. Lorsqu'une famille se présente devant notre tribunal avec différents problèmes à régler, nous sommes en mesure de lui proposer des solutions plus cohérentes que si elle s'adressait à différents tribunaux. (Réunion 26)

Dans chaque région de l'État, la Cour de circuit a une division appelée The Friend of the Court (l'Ami de la cour). Ce bureau est chargé d'enquêter sur la garde des enfants, le temps consacré par les parents aux enfants et les questions de pensions alimentaires, de faire des recommandations aux tribunaux et d'amorcer l'application des ordonnances touchant ces questions⁴². Les travailleurs sociaux à l'emploi du bureau de l'Ami de la cour prêtent main-forte aux juges chargés des divorces en évaluant les cas du point de vue de la garde des enfants et du temps consacré aux enfants. Si les parties ne sont pas satisfaites de la recommandation du travailleur social, elles ont droit à une audience de conciliation qui, si elle échoue, mène à la troisième étape, le procès. Ces travailleurs sociaux s'occupent aussi des questions touchant la protection des enfants; ils jouent alors un rôle plus proactif en tant que défenseurs des droits des enfants.

⁴⁰ Article 6a.

⁴¹ Article 7a.

⁴² Cour suprême du Michigan, FAQ, « Family Issues », à consulter à l'adresse http/www.supremecourt. state.mi.us/faq/faqfam.htm.

Le bureau de l'Ami de la cour s'occupe de mettre en application les ordonnances concernant le temps consacré aux enfants. S'il est convaincu qu'il y a eu infraction à l'ordonnance, il appliquera la politique locale de compensation en la matière (chaque tribunal doit en avoir une)⁴³. On peut également prévoir une audience pour outrage au tribunal, à laquelle le parent en défaut devra justifier par de bonnes raisons pourquoi il n'a pas respecté l'ordonnance, ou faire appel au tribunal pour que l'ordonnance soit changée. Le tribunal peut également suspendre le permis professionnel ou le permis de conduire du parent pour violation d'une ordonnance relative au temps consacré aux enfants. M. Thomas Darnton, professeur de droit invité à la Clinique de défense des droits des enfants de l'Université du Michigan, décrit en ces termes le rôle d'application de l'Ami de la cour, rôle qu'appuient les tribunaux :

Si par exemple, un emploi du temps établi n'est pas respecté, il est possible de convoquer une audience. Là encore, ces audiences sont dépourvues de caractère officiel et il arrive fréquemment que les avocats n'y participent pas. C'est à cette occasion que l'« ami de la cour » cherchera à comprendre les causes de tel problème, ordonnera le cas échéant des visites en remplacement de celles qui ont été manquées et recommandera d'apporter des changements au calendrier des visites. Il dispose de plusieurs options, notamment celle de modifier les ordonnances et d'exiger des visites de rattrapage. Il peut même imposer des sanctions financières ou recommander d'incarcérer les parents qui ne respectent pas l'ordonnance. Les arbitres ne peuvent pas incarcérer les gens, seuls les juges peuvent le faire. Mais ce genre de sanction n'est pas appliquée fréquemment. (Réunion 26)

L'État de Washington

Avec la l'adoption du *Parenting Act* en 1987, l'État de Washington a été le premier État américain à adopter un système d'entente parentale⁴⁴. Aux termes « garde des enfants » et « droit de visite », le *Parenting Act* a substitué le concept de « placement résidentiel » ⁴⁵. Le législateur voulait ainsi déplacer l'accent mis sur les conflits parfois acerbes entre les parents vers la question plus importante, la meilleure entente parentale pour les enfants. Bon nombre des témoins ont dit approuver le modèle de Washington, mais ils ne comprenaient pas tous très bien les effets de la loi. Certains pensaient par exemple qu'elle présumait ou exigeait l'exercice conjoint du rôle parental, ce qui n'est pas le cas.

Le mécanisme de base qui permettra d'énoncer les arrangements entre parents après la séparation est l'entente parentale. Les parents qui se séparent dans l'État de Washington doivent établir une entente détaillée temporaire et permanente. Il se divise en trois parties : un calendrier de résidence, un plan de partage des responsabilités et un mécanisme de résolution des conflits. Cette réflexion vise à aider les parents à mieux comprendre les besoins complexes des enfants et l'importance d'une collaboration mutuelle dans la prise de décisions. De longs formulaires obligent les parents à examiner une liste de questions pratiques afin de répondre aux besoins des enfants. Le calendrier de résidence doit indiquer chez lequel de ses parents l'enfant habitera certains jours de l'année.

On espère toujours que les parties s'entendront d'elles-mêmes sur l'entente parentale, mais au cas où elles ne pourraient le faire, la loi prévoit des critères suivant lesquels le tribunal pourra imposer une entente parentale. Les modalités de résidence doivent encourager chacun des parents à entretenir des rapports

Cour suprême du Michigan, FAQ, « Public Programs : Friend of the Court », à consulter à l'adresse http/www.supremecourt.state.mi.us/pubprog/focb/brochure/enforce.htm.

On trouvera de plus amples renseignements sur la loi de l'État de Washington dans un document de la Bibliothèque du Parlement intitulé Les lois sur la garde et le droit de visite des enfants : modèles d'autres compétences administratives, 18 février 1998.

⁴⁵ Conseiller en droits de la famille, Frequently Asked Questions: « Washington Parenting Plan FAQs », p. 1, à consulter à l'adresse http:///www.divorcenet.com/wa/wa-faq04.html.

affectueux, stables et étroits avec l'enfant, qui conviennent au niveau de développement de l'enfant et à la situation socio-économique de la famille. Toutefois, le temps qu'un enfant passe chez l'un ou l'autre de ses parents doit être limité si ce dernier a manifesté l'un ou l'autre des comportements suivants : abandon délibéré de l'enfant, abus physique, sexuel ou émotionnel de l'enfant, violence familiale ou agression sexuelle, ou condamnation pour une infraction de nature sexuelle précise parmi plusieurs autres.

La loi de l'État de Washington ne traite pas de la garde conjointe des enfants ni de l'exercice conjoint du rôle parental, et ne comporte aucune règle générale implicite quant au caractère souhaitable de telles dispositions. Le partage du rôle parental aux termes d'un plan parental est possible et peut même être imposé par le tribunal s'il est dans l'intérêt de l'enfant.

Toute question litigieuse peut être renvoyée à la médiation avant que l'affaire soit entendue ou en même temps, à moins que l'une des parties ne puisse en partager le coût ou que sa santé émotionnelle ou physique ne soit mise en danger. La loi prévoit que le tribunal peut nommer un avocat pour représenter l'enfant dans une procédure touchant n'importe quel des aspects d'un plan parental dans une affaire de dissolution de mariage ou de séparation légale⁴⁶. Dans ce cas-ci, le tribunal ordonnera que l'un des parents ou les deux paient les honoraires de l'avocat de l'enfant.

M. Gene Oliver, un avocat de Seattle qui se spécialise dans les causes d'enlèvement d'enfants, a dit au Comité que le *Parenting Act* avait réussi à atténuer les conflits dans la plupart des procédures concernant les enfants. La loi a pour avantage plutôt que de mettre l'accent sur l'idée d'une quelconque « propriété » de l'enfant d'insister sur les responsabilités concrètes de l'exercice du rôle de parent, comme l'emploi du temps, la prise de décisions, etc. Toutefois, les innombrables détails requis dans les formulaires des plans parentaux ont fait augmenter le coût et la durée de la plupart des procédures; la plupart des parents auraient pu régler leurs affaires à l'amiable sans avoir à payer pour l'établissement d'une entente parentale.

L'entente parentale est très compliquée à rédiger et il comporte beaucoup de détails. Pour les gens qui n'en ont pas besoin, c'est souvent une perte de temps et d'argent et cela soulève parfois des questions que les parents auraient tout à fait été à même de régler au fur et à mesure. Mais lorsqu'on les aborde abstraitement en même temps qu'on oblige les parties à s'asseoir à la table de discussion et à s'entendre avant que le divorce ne soit prononcé, cela cause les problèmes. (Réunion 19, Vancouver)

Le Dr John Dunne, psychiatre et membre du comité chargé d'élaborer le *Parenting Act*, fait une recherche sur les répercussions de la loi. Les premiers résultats montrent que les rédacteurs de la nouvelle loi n'ont pas réalisé leurs objectifs et que la loi a eu des effets négatifs sur l'ajustement des parents après le divorce. Ni les parents ni les enfants n'étaient plus avantagés avec la nouvelle loi.

Le Parenting Act [...] exige des gens qu'ils divorcent une deuxième fois. Ils doivent en effet établir un plan temporaire de responsabilité parentale qui engendre souvent beaucoup de conflits et qui prend plusieurs mois avant de fonctionner. Puis ils doivent faire un virage à 90 degrés et commencer à élaborer un plan permanent de responsabilité parentale. Je pense que cette situation est responsable pour une large part de l'anxiété que vivent les parents en vertu de la nouvelle loi, une anxiété qui n'était pas présente avec l'ancienne. (Réunion 19, Vancouver)

Le Dr Diane Lye a été mandatée par la Cour suprême de l'État de Washington pour entreprendre un important projet de recherche afin d'évaluer les effets du *Parenting Act*. Elle fait la distinction entre les effets de la loi d'une part sur les parents plus fortunés, qui ont le temps et l'argent nécessaires pour rencontrer des

⁴⁶ Article 26.09.110.

Rannort du	Comité mixte	snécial sur la	garde et le droit	de visiste des enfants
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spécialistes et élaborer des plans qui répondent vraiment à leurs besoins, et d'autre part sur les personnes à faible revenu, pour lesquelles la loi présente un inconvénient particulier.

Les personnes à faible revenu, les immigrants ou les gens pour qui l'anglais est une langue seconde sont souvent désavantagés par le système parce qu'ils ne peuvent se permettre de consacrer ni le temps ni l'argent nécessaires pour obtenir les services dont ils ont besoin pour que le système fonctionne pour eux. (Réunion 19, Vancouver)



Chapitre 4 : Rôles du gouvernement fédéral et des provinces

Le Comité reconnaît et souligne l'importante distinction qui existe entre le rôle du gouvernement fédéral et celui des provinces et territoires dans le domaine du droit de la famille et des nombreux services connexes. Les membres du Comité ont été conscients tout au long de l'étude que bien des sujets abordés par les témoins touchaient des secteurs de compétence extérieurs au cadre fédéral. Mais compte tenu de l'intérêt pour la question et de l'extraordinaire expertise des témoins, ils ont jugé essentiel de rendre compte de tous les champs d'action possibles. Cependant, le Comité s'est efforcé dans la mesure du possible d'identifier l'ordre de gouvernement ayant la responsabilité et les pouvoirs applicables à chaque sphère particulière, ainsi que de préciser les domaines où les divers paliers auront à travailler ensemble pour mettre en oeuvre les changements qui s'imposent.

A. Le gouvernement fédéral

1. La Loi sur le divorce

(i) Aucune présomption

La principale mesure législative examinée au cours des séances du Comité a bien évidemment été la *Loi sur le divorce*. D'après un certain nombre de témoins, les dispositions actuelles de la *Loi sur le divorce* concernant la garde et l'accès constituent un cadre utile pour la prise de décisions. Bon nombre de rapports soulignant la nature insatisfaisante du mécanisme décisionnel en matière de garde et d'accès dans le régime juridique actuel portaient sur des aspects autres que le libellé de la loi. Il y a tout de même eu des recommandations préconisant de changer diverses dispositions de la Loi ou son approche globale.

Il a souvent été recommandé que la *Loi sur le divorce* soit modifiée de façon à englober une présomption juridique susceptible d'aider les parents et les juges à prendre des décisions sur les arrangements parentaux. Bon nombre de femmes, individuellement ou en groupe, ont fermement soutenu que la Loi devrait donner préséance au principal fournisseur de soins, car c'est ce qui refléterait le mieux la réalité des familles intactes où les femmes accomplissent la plupart des fonctions liées aux soins des enfants. C'est l'approche souvent adoptée par les tribunaux canadiens, en l'absence d'une présomption établie par la Loi. Comme l'a dit au Comité le professeur de droit, Susan Boyd :

Les études démontrent clairement que, dans l'immense majorité des familles intactes et des familles où il y a eu un divorce, ce sont encore les mères qui agissent comme le parent principal prioritaire. Même lorsque les mères travaillent à l'extérieur, elles consacrent environ deux fois plus de temps à leurs enfants que les pères qui travaillent. Ces études [Les femmes au Canada, Statistique Canada, et Women Count, publiée par la province de la Colombie-Britannique] démontrent que la majorité des pères ne s'occupent pas de leurs enfants autant que les mères. (Comité spécial sur la garde et le droit de visite des enfants, réunion 27, Vancouver)

Le fait de mettre l'accent sur les ententes parentales qui prévalaient durant le mariage est conforme au point de vue souvent exprimé par les tribunaux canadiens voulant que la vie des enfants soit perturbée le moins possible et que le maintien au mieux du rôle des parents après la séparation favorise la stabilité. Toutefois, le médiateur Howard Irving a fait valoir qu'il ne fallait pas, en se fondant sur la division des tâches convenue volontairement par les parties durant le mariage, enlever aux pères la possibilité de véritablement participer aux soins parentaux.

Je ne pense pas qu'il faille envisager les choses sous l'angle de parent principal. La notion me gêne beaucoup. Bon nombre de pères et de mères ont décidé au moment de leur mariage, avant même d'avoir des enfants, que l'un serait le parent qui resterait à la maison et que l'autre occuperait un emploi à l'extérieur de la maison. C'était une décision mutuelle. [...] Ce qui est important, c'est qu'une décision est prise par les parents. Est-il juste de punir un parent parce qu'il ne peut pas passer avec les enfants tout le temps qu'il voudrait — qu'il s'agisse du père ou de la mère — alors qu'il a un lien émotif très fort avec ses enfants? D'après moi, il faudrait plus tenir compte de la qualité de la relation que du nombre de minutes et d'heures passées avec l'enfant. (Réunion 11)

Par contre, beaucoup de témoins, dont des pères individuels, des groupes de pères et des champions de l'exercice conjoint des responsabilités parentales, ont fortement préconisé de modifier la Loi de façon à y inclure une présomption en faveur de la garde physique conjointe, c'est-à-dire un arrangement grâce auquel les enfants passeraient à peu près le même temps avec chacun des parents et les décisions seraient prises en commun. D'après eux, une telle présomption constituerait la meilleure façon d'équilibrer les règles du jeu et de compenser tout avantage injuste que les femmes peuvent avoir dans les conflits portant sur les arrangements parentaux en raison du parti pris qui favorise leur sexe. D'autres étaient d'avis que l'initiative renforcerait le rôle joué par les pères après le divorce, dans l'intérêt ultime des enfants.

Le Comité s'est intéressé aux témoignages sur les avantages de la garde conjointe, tant pour les parents que pour les enfants, lorsqu'elle est acceptée volontairement et qu'elle fonctionne bien. Ce type d'arrangement comprend d'ordinaire la prise en commun des décisions par les parents, du moins pour les aspects essentiels comme les études, la religion ou les traitements médicaux, chacun des parents s'occupant des enfants pour des laps de temps prolongés. Il semble y avoir au moins des données anecdotiques démontrant qu'en présence d'enfants ayant suffisamment de maturité, de parents bien disposés et d'une conjoncture économique favorable, la garde conjointe présente des avantages pour les enfants. Toutefois, l'adoption de mesures législatives qui imposeraient ou normaliseraient la garde conjointe en cas de divorce ferait fi du fait que l'arrangement ne convient peut-être pas à toutes les familles, notamment à celles qui ont connu la violence ou dans lesquelles les rôles des deux parents sont très différents.

Un certain nombre d'administrations aux États-Unis ont adopté comme norme la garde conjointe ou la préséance au principal pourvoyeur de soins mais, dans certains cas, les assemblées législatives ont fait marche arrière après avoir constaté que cette façon de procéder ne produisait pas les effets positifs escomptés. Présumer qu'une forme particulière d'arrangements entre les parents servirait au mieux l'intérêt de tous les enfants pourrait occulter les différences significatives qui existent entre les familles. Edward Kruk, le professeur en travail social, a fait la mise en garde suivante :

Parce qu'il y a beaucoup d'écarts dans notre société dans la façon dont les hommes et les femmes s'acquittent de leurs rôles de parents, toute solution à « taille unique » en matière de garde d'enfants, qu'il s'agisse de la garde partagée ou du principal fournisseur de soins, crée des difficultés. Les travaux de recherche nous révèlent que les enfants s'en tirent mieux lorsque l'entente cherche à reproduire le plus exactement possible les relations qui s'établissaient entre les parents et l'enfant avant le divorce, dans un climat de coopération optimale entre les parents. (Réunion 27, Vancouver)

Les membres du Comité ont été avertis que de préconiser une forme quelconque de modèle d'arrangement entre les parents après le divorce désavantagerait les enfants. Il y a en effet trop de variations entre les familles pour qu'une règle générale unique soit dans l'intérêt de tous les enfants canadiens.

Certains ont proposé que soit privilégié le principe du principal pourvoyeur des soins ou de la garde conjointe. Nous ne sommes pas d'accord. À notre avis, les tribunaux doivent continuer de pouvoir décider quelle solution s'impose dans chaque cas. Présumer que la solution idéale est celle qui existait avant la séparation ou que les parents veulent tous deux s'occuper des besoins de leurs enfants et sont en mesure de le faire, n'aidera en rien la situation. Une présomption en faveur de la garde conjointe est, en particulier, une présomption en faveur d'un concept juridique qui est extrêmement élastique. À notre avis, le fait même que la garde conjointe soit un concept assez flou est suffisant pour faire en sorte qu'une présomption à cet égard soit inutile. (Angus Schurman, avocat, réunion 30, Halifax)

Les présomptions peuvent également avoir pour effet négatif d'obliger les familles, par ailleurs capables de conclure un arrangement constructif et amical, à faire appel au tribunal afin d'éviter l'application de la formule normalisée d'arrangement entre parents. L'avocate Daphne Dumont a demandé au Comité d'examiner cette conséquence non intentionnelle.

Mieux vaut ne pas établir de présomption qui obligerait les parents à consulter les tribunaux. Le gouvernement fédéral ne devrait en aucun cas établir de régime contre lequel les parents qui ont la garde devront lutter pour protéger leurs enfants. Les parents qui ont la garde sont généralement plus pauvres que ceux qui ne l'ont pas, surtout avant que ne commence à être versée une pension alimentaire pour enfants, une pension alimentaire qui se fait très souvent attendre. L'obligation de devoir s'entendre sur les conditions du droit de visite pour qu'existe ce droit encourage fortement les parties à en arriver à un règlement. Cet avantage sera perdu si le gouvernement impose un régime de partage égal du temps parental. (Réunion 31, Charlottetown)

Se fondant sur cet argument, un certain nombre de témoins ont conclu que la *Loi sur le divorce* ne devrait pas subir de modifications qui introduiraient une présomption en faveur d'un type particulier de régime parental. Ils ont suggéré de renforcer plutôt le principe de « l'intérêt supérieur de l'enfant » sur lequel se fondent les décisions en matière de garde et de droit de visite. De plus, il a été avancé que les familles pourraient bénéficier d'une plus grande disponibilité de services non juridiques visant à mieux informer sur leurs options les couples qui divorcent. Munis de plus de ressources et de meilleurs renseignements, les parents pourraient, par leur conduite et leurs décisions après la séparation, améliorer au mieux le sort de leurs enfants. Voici ce que l'avocat Michael Cochrane a fait remarquer au Comité :

Au lieu d'une présomption de garde conjointe, avec laquelle je ne suis pas d'accord, nous devrions avoir une liste de désirs beaucoup plus complexe dont le juge aurait connaissance et dont les avocats et leurs clients pourraient discuter. Avec cette liste plus détaillée de choix et des consommateurs mieux avertis, nous obtiendrions de meilleurs plans de responsabilité parentale et les gens réclameraient les choses auxquelles ils savent avoir droit au lieu de s'incliner au mauvais moment ou de ne pas faire ce qui est vraiment dans leur intérêt ou dans celui de leurs enfants. (Réunion 13)

(ii) L'intérêt supérieur de l'enfant

Bon nombre de témoins ont souligné l'importance du principe de « l'intérêt de l'enfant », énoncé à l'article 16(8) de la Loi, affirmant qu'il est le seul à être suffisamment large, souple et discrétionnaire pour permettre aux tribunaux de pleinement considérer la situation de chaque enfant visé par une dispute touchant

les arrangements entre parents. D'autres par contre ont critiqué le principe comme étant trop imprécis pour réellement guider les parents qui se séparent. Le concept de l'« intérêt supérieur de l'enfant » est largement utilisé au Canada et ailleurs et par conséquent, est un concept admis, au moins dans une certaine mesure. Toutes les lois provinciales en droit de la famille au Canada citent le bien-être ou l'« intérêt supérieur de l'enfant » comme le premier critère dans la prise de décisions concernant la garde et les droits de visite⁴⁷, et l'expression se retrouve dans les lois de bon nombre d'autres administrations ainsi que dans quelques traités internationaux.

Certains témoins proposent que la *Loi sur le divorce* soit modifiée par l'inclusion d'une liste de critères, ou d'une définition de l'« intérêt supérieur de l'enfant », afin de guider les juges et les parents qui doivent appliquer le principe. Sans être exhaustive, une telle liste énoncerait tous les aspects auxquels les décisionnaires devraient prêter attention. Certaines situations dans lesquelles se trouvent les enfants pourraient nécessiter la considération de facteurs autres que ceux énoncés dans la Loi. La présence d'une liste de critères directeurs améliorerait la prévisibilité des résultats et encouragerait l'examen des facteurs considérés particulièrement importants pour le bien-être de l'enfant.

Les témoins ont formulé diverses suggestions sur ce que devrait comprendre la liste des critères visant l'« intérêt supérieur de l'enfant ».

L'objectif premier est d'offrir la sécurité, la stabilité et l'éducation, l'essence même des relations parents-enfants qui sont chaleureuses, affectueuses et attentives.

Le deuxième objectif est de procurer un milieu familial exempt d'agitation psychologique et d'abus d'alcool et autres drogues.

Troisièmement, il faudrait diminuer ou éliminer les conflits entre les parents et l'exposition à la violence.

Quatrièmement, les parents doivent prendre des décisions opportunes concernant les enfants.

Cinquièmement, il doit y avoir des services spécialisés et précis de soutien pour les enfants en milieu familial violent. Il s'agit là d'un groupe d'enfants qui a des besoins plus importants que les autres familles qui endurent un divorce.

Sixièmement, il devrait y avoir des dispositions spéciales au niveau des parents si la violence se poursuit et il faudrait offrir une protection spéciale aux enfants. (Rhonda Freeman, Families in Transition, réunion 17).

J'aimerais que la loi soit modifiée de façon à ce que les juges se concentrent sur la violence familiale. J'aimerais que soit ajoutée au paragraphe 16(9) de la *Loi sur le divorce* la phrase suivante « La violence familiale doit être considérée comme un comportement mettant en doute la capacité d'agir comme parent d'un enfant ». (Eve Roberts, avocate, réunion 29, St. John's)

À mon avis, il faudrait ajouter un critère concernant les enfants, un critère concernant la capacité d'adaptation de l'enfant aux plans parentaux proposés. Autrement dit, les enfants réagissent différemment, pas seulement à cause de leur âge, mais dans un même groupe d'âge, ils peuvent

⁴⁷ Le principe de « l'intérêt supérieur de l'enfant » est présent dans les dispositions législatives sur la garde et le droit de visite dans toutes les administrations canadiennes régies par la common law, sauf en Alberta, dans les Territoires du Nord-Ouest et en Nouvelle-Écosse où l'on utilise l'expression plus ou moins synonyme de « bien-être de l'enfant ». Le Code civil du Québec, précise que : « Les décisions concernant l'enfant doivent être prises dans son intérêt et dans le respect de ses droits » (article 33).

s'adapter différemment aux divers changements apportés à leur environnement et il est impossible d'appliquer le même plan à tous. (Gary Austin, psychologue, Consultant London Family Court Clinic, réunion 18)

Elaine Rabinowitz, membre du Prince Edward Island Provincial Child Sexual Abuse Advisory Committee, a énoncé un série de principes qui devraient faire partie de la définition de l'intérêt supérieur de l'enfant : (1) le développement de l'enfant; (2) la continuité des soins; (3) la continuité des rapports avec les deux parents; (4) la solution de rechange la moins mauvaise; (5) le contexte familial.

La Section nationale du droit de la famille, de l'Association du Barreau canadien, a recommandé que soit énumérées dans la *Loi sur le divorce* des critères semblables à ceux qui se retrouvent dans la *Loi portant réforme du droit de l'enfance*, adoptée par l'Ontario et modifiée pour s'harmoniser avec l'éventuelle terminologie de la législation fédérale. La liste de recommandations contient plusieurs éléments qui s'ajoutent à ceux de la loi ontarienne, dont les suivants :

- le rôle joué par chacune des personnes cherchant à obtenir la garde dans les soins donnés à l'enfant depuis sa naissance;
- tout acte de violence familiale perpétré par l'une ou l'autre des parties demandant à obtenir la garde ou un droit d'accès;
- les liens culturels existants et l'appartenance religieuse;
- l'importance et l'avantage pour l'enfant d'entretenir des relations suivies avec ses parents⁴⁸.

Recommandations

- 15. Le Comité recommande que la *Loi sur le divorce* soit modifiée de façon à ce que les décisions relatives à l'exercice des responsabilités parentales prises en vertu des articles 16 et 17 soient prises en fonction de « l'intérêt supérieur de l'enfant ».
- 16. Le Comité recommande que ceux qui prennent les décisions, parents et juges compris, déterminent l'« intérêt supérieur de l'enfant » à l'aide d'une liste de critères et que cette liste comprennent les éléments suivants :
 - 16.1 La solidité, la nature et la stabilité des relations qui existent entre l'enfant et les personnes habilitées à exercer les responsabilités parentales à son égard ou à demander une ordonnance en ce sens;
 - 16.2 La solidité, la nature et la stabilité des relations qui existent entre l'enfant et les autres membres de sa famille qui habitent avec lui, d'une part, et les personnes qui s'occupent de lui et de son éducation, d'autre part;
 - 16.3 Les points de vue de l'enfant, lorsqu'ils peuvent être raisonnablement définis;
 - 16.4 La capacité et la volonté de chaque demandeur d'ordonnance de pourvoir à l'éducation de l'enfant, à son développement, aux nécessités de sa vie et à ses besoins spéciaux;

Mémoire de la Section nationale du droit de la famille, de l'Association du Barreau canadien, intitulé « L'examen des questions de garde des enfants et de droit d'accès », mai 1998, p. 5.

- 16.5 Les liens culturels et la religion de l'enfant;
- 16.6 L'importance et l'avantage pour l'enfant de la responsabilité parentale partagée, permettant aux deux parents de demeurer activement présents dans sa vie après la séparation;
- 16.7 L'importance des rapports entre l'enfant, ses frères et soeurs, ses grands-parents et les autres membres de la famille élargie;
- 16.8 Les ententes parentales proposées par les parents;
- 16.9 La capacité pour l'enfant de s'adapter aux ententes parentales proposées;
- 16.10 La volonté et la capacité de chacune des parties de faciliter et d'encourager une relation étroite et continue entre l'enfant et l'autre parent;
- 16.11 Tout antécédent prouvé de violence familiale perpétrée par la partie réclamant une ordonnance parentale;
- 16.12 Aucun des deux parents ne doit bénéficier d'un traitement de faveur fondé exclusivement sur son sexe;
- 16.13 La volonté démontrée par chaque parent d'assister aux séances prescrites d'éducation des parents.
- 16.14 Tout autre facteur jugé pertinent par le tribunal dans un conflit donné relatif à l'exercice partagé du rôle de parent.

(iii) Langues officielles

Les préoccupations des personnes qui se présentent devant les tribunaux en vertu de la Loi sur le divorce quant à l'accès aux services des tribunaux dans la langue officielle de leur choix ont amené le Comité à envisager l'application de la Loi sur les langues officielles aux actions en divorce. L'utilisation de l'anglais ou du français dans le système judiciaire est généralement régie par un certain nombre des dispositions constitutionnelles qui s'appliquent à certains tribunaux. L'utilisation des deux langues officielles dans les cours fédérales est garantie par la Loi constitutionnelle de 1867 et par la Charte canadienne des droits et libertés, mais les causes de divorce sont entendues par les tribunaux provinciaux auxquels ne s'appliquent pas, de manière uniforme, de tels droits en matière de langue. Le droit des parties à être entendues dans l'une ou l'autre des langues officielles n'est protégé par la constitution qu'au Nouveau-Brunswick, au Québec et au Manitoba. Le Comité est d'avis qu'étant donné que la Loi sur le divorce régit tous les divorces au Canada et que l'on trouve partout au pays des Canadiens dont la langue de choix est soit le français soit l'anglais, les services des tribunaux en matière de divorce devraient être offerts dans les deux langues officielles partout au pays.

En novembre 1995, le Commissaire aux langues officielles a publié un rapport sur l'utilisation du français et de l'anglais dans les tribunaux canadiens⁴⁹. Dans ce rapport, on passe en revue le cadre constitutionnel qui protège l'utilisation des deux langues officielles dans le système judiciaire, l'utilisation des deux langues officielles devant les tribunaux de juridiction criminelle et l'utilisation des deux langues

⁴⁹ Commissaire aux langues officielles, L'utilisation équitable du français et de l'anglais devant les tribunaux au Canada, novembre 1995.

officielles devant les tribunaux civils. Le rapport note que les droits linguistiques ont été étendus de manière importante en matière criminelle, même si des causes criminelles sont également entendues par les tribunaux provinciaux. L'article 530.1 du *Code criminel du Canada* stipule spécifiquement que les accusés ont droit à un procès dans la langue officielle de leur choix. Les accusés ont également le droit d'avoir un avocat, un procureur et un juge qui parlent la langue officielle de leur choix. La transcription du procès et les jugements écrits doivent être présentés dans la langue choisie par l'accusé. Pour permettre le respect de ces droits linguistiques, le gouvernement fédéral a prévu des fonds pour la formation linguistiques des juges dans le but d'accroître le nombre de juges capables de présider dans les deux langues officielles.

La Loi sur les langues officielles ne s'applique pas à l'administration de la Loi sur le divorce par les tribunaux provinciaux. Dans les trois provinces où les droits de la minorité linguistique sont protégés par la Constitution, les services judiciaires sont offerts dans les deux langues officielles. Dans les sept autres provinces, la prestation de service dans la langue de la minorité - le français - varie d'une province à l'autre et à l'intérieur d'une même province comme l'a noté le Commissaire aux langues officielles. Le gouvernement fédéral n'a aucune autorité législative en matière de procédure civile devant les cours provinciales, mais le Cabinet fédéral possède une autorité exclusive pour ce qui est de la nomination des juges appelés à entendre les causes de divorce. En exerçant ses pouvoirs de nomination judiciaire, le gouvernement fédéral pourrait assurer l'utilisation de l'anglais et du français dans les causes entendues devant certains tribunaux. Constatant l'expansion des tribunaux unifiés de la famille au pays, le Comité est d'avis qu'il faudrait, dans toute la mesure du possible, procéder à la nomination de juges bilingues pour présider ces tribunaux.

Les Canadiens qui sont en instance de divorce devraient pouvoir obtenir les services des tribunaux dans la langue de leur choix partout au pays. À cette fin, le Comité a conclu que la *Loi sur le divorce* devait être modifiée de manière à préciser que les parties en cause ont droit à ce que leur cause soit entendue dans la langue officielle de leur choix. Ces modifications devraient s'inspirer des dispositions relatives aux droits linguistiques figurant dans l'article 530.1 du *Code criminel*.

Recommandation

17. Le Comité recommande de modifier la *Loi sur le divorce* de manière à ce que les parties aux procédures engagées aux termes de la *Loi sur le divorce* puissent opter pour que ces dernières se déroulent dans l'une ou l'autre des langues officielles du Canada.

(iv) Existence du rôle des parents au-delà du divorce

Le principe selon lequel les relations avec les parents doivent survivre au divorce et ne devraient d'aucune façon dépendre du maintien de la relation maritale est un argument clé présenté par les témoins et auquel les membres du Comité se sont montrés particulièrement sensibles. Cette façon de voir transparaît dans les témoignages concernant le manque de pertinence de la terminologie utilisée dans la *Loi sur le divorce*, et se traduit par un désir de voir une profonde réorientation des dispositions législatives. Bon nombre de témoins ont fait valoir que les parents ne divorcent pas de leurs enfants et que le maintien de leur rôle parental et de leurs relations avec leurs enfants ne devraient pas être occultés par l'application à leur situation des dispositions de la *Loi sur le divorce*. Comme l'a expliqué l'avocat Christian Tacit :

Je crois que votre comité se doit de tenir compte du fait que les parents sont des parents avant la séparation et le divorce et qu'ils demeurent des parents après la séparation et le divorce. Rien dans le divorce comme tel prive un parent du droit inhérent d'être un parent, et l'État n'a aucune

raison d'intervenir là-dedans ou de faire des présomptions contraires, à moins que le comportement du parent justifie l'intervention du bureau de la protection de l'enfance ou du système de justice pénale. (Réunion 34)

Le nouveau régime de la *loi sur le divorce* recommandé par le Comité et la substitution, dans la terminologie législative, des mots « garde » et « accès » par l'expression « partage des responsabilités parentales » sont conçus pour assurer le maintien des relations parentales après divorce. La prémisse est semblable à la disposition du *Code civil* du Québec qui prévoit que les parents, quelle que soit leur situation matrimoniale, exercent une autorité parentale conjointe envers leurs enfants⁵⁰. Ce régime diffère d'une façon marquée de celui des provinces régies par la Common Law.

Lorsque le tribunal accorde la garde d'un enfant à un des parents de façon exclusive, sans autre indication dans le jugement, cela n'affecte pas l'autorité parentale conjointe, sauf dans les petites décisions quotidiennes qui, de toute évidence, appartiennent au parent qui a l'enfant avec lui au quotidien. De même que le parent gardien prend ces décisions lorsque l'enfant est avec lui, de la même façon, le parent « non gardien » prend ces mêmes décisions lorsqu'il exerce son droit d'accès, son droit de visite, son droit de sortie. (Dominique Goubau, Barreau du Québec, réunion 4)

Le Family Law Reform Act d'Australie établit, comme premier de quatre principes qui sous-tendent la loi, que les enfants ont le droit de connaître leurs deux parents et d'en recevoir des soins, peu importe que leurs parents soient mariés, qu'ils soient séparés, qu'ils n'aient jamais été mariés ou qu'ils n'aient jamais vécu ensemble⁵¹. La loi stipule également que chacun des parents d'un enfant de moins de 18 ans a une responsabilité parentale à son égard⁵². Cette disposition reste expressément en vigueur malgré tout changement dans la nature des relations des parents de l'enfant⁵³, comme une séparation ou un remariage.

(v) Les Lignes directrices fédérales sur les pensions alimentaires pour enfants

Les Lignes directrices fédérales sur les pensions alimentaires pour enfants constituent l'une des sources d'insatisfaction les plus souvent signalées concernant le mécanisme juridique employé pour répartir les responsabilités financières et autres entre les parents après une séparation ou un divorce. Ces lignes directrices sont entrées en vigueur le 1^{er} mai 1997, par suite de l'adoption du projet de loi C-41 modifiant la *Loi sur le divorce* et deux autres lois fédérales. Les nouvelles dispositions ont engendré les Lignes directrices fédérales sur les pensions alimentaires pour enfants, qui existent en tant que règlement d'application de la Loi, et ont renforcé les mesures législatives fédérales concernant l'exécution des obligations en matière de pensions alimentaires. Les lignes directrices sont apparues en même temps que le traitement fiscal des pensions a été modifié : dorénavant, les versements de pension ne sont plus imposables pour celui qui les reçoit, habituellement le parent gardien, ni déductibles pour le payeur⁵⁴, habituellement le parent non gardien.

Les lignes directrices ont créé des conflits dans bien des cas où il n'en existait pas : certaines affaires réglées depuis longtemps ont été réouvertes à cause de la disposition rendant l'existence des lignes directrices suffisante pour permettre au bénéficiaire de la pension de réclamer une révision du montant versé par le payeur. Aux yeux des parents nouvellement séparés, les lignes directrices semblent injustes étant donné qu'elles se fondent exclusivement sur le revenu du parent payeur. L'avocat d'Ottawa Christian Tacit a cerné

L'article 600 du Code civil du Québec se lit comme suit : « Les père et mère exercent ensemble l'autorité parentale. Si l'un d'eux décède, est déchu de l'autorité parentale ou n'est pas en mesure de manifester sa volonté, l'autorité est exercée par l'autre ».

⁵¹ Article 60B(2).

⁵² Article 61C(1).

⁵³ Article 61C(2).

⁵⁴ En droit de la famille, celui qui assume l'entretien d'enfant ou d'un conjoint s'appelle généralement le « payeur ».

l'éventail des préoccupations exprimées au Comité par bon nombre des parents non gardiens qui sont venus témoigner.

De la façon dont elles sont actuellement rédigées, les Lignes directrices fédérales sur les pensions alimentaires sont une invitation à faire appel aux tribunaux sur la question de la garde et le droit de visite. Premièrement, il y a le seuil de 40 p. 100 relatif au droit de visite, qui est prévu indépendamment des besoins et des circonstances des parties, au lieu de simplement consulter les tables. Deuxièmement, il y a la présomption selon laquelle les gens, après une séparation et un divorce et, après avoir subi un désastre sur le plan financier, peuvent tout simplement s'en remettre aux tables sans tenir compte des dépenses engagées; troisièmement, il y a le fait que le critère des difficultés excessives utilise un test de rapport moyen qui est tout à fait irréaliste, compte tenu encore une fois des coûts que les parties ont engagés relativement à la séparation et au divorce. Il y a donc des problèmes importants à ce niveau. (Réunion 34)

Le Comité note que le Comité sénatorial permanent des affaires sociales, des sciences et de la technologie a publié en juin 1998 un rapport intérimaire qui contient une série de recommandations destinées à améliorer les lignes directrices. Le présent Comité a entendu des témoignages au sujet d'aspects abordés dans ce rapport et il félicite le Comité sénatorial pour son travail. Il croit que les préoccupations soulevées par les témoins ayant participé à l'actuelle étude enrichiront les données recueillies par le Comité sénatorial et devraient être prises en considération dans le cadre de l'examen continu des lignes directrices et de leur application.

On admet généralement que les lignes directrices fédérales sur les pensions alimentaires pour enfants ont contribué d'une façon positive à améliorer la prévisibilité du montant des pensions et à réduire l'intérêt qu'il y a à engager un débat ou des poursuites sur ces montant. Mais ces avantages ne contrebalancent pas les inconvénients inhérents à l'augmentation des conflits dans les couples qui divorcent. Une des questions litigieuses (qui ne découle pas directement des changements au projet de loi C-41, mais qui fait néanmoins partie de la controverse entourant cette mesure et demeure inchangée) est soulevée par la définition d'« enfant à charge », dans la *Loi sur le divorce* qui a été interprétée par la jurisprudence de manière à inclure les enfants majeurs (parfois jusque dans leur vingtaine) s'ils entreprennent des études postsecondaires. Cette règle établie par les tribunaux a eu souvent pour effet d'obliger les parents non gardiens à payer pour l'éducation postsecondaire de leurs enfants, règle à laquelle ne sont pas soumis, les parents de familles intactes.

Les groupes de pères et de parents non gardiens qui ont témoigné devant le Comité ont souvent abordé cette question. Ils ont mis en évidence l'injustice perçue de cette obligation financière dans les cas où il n'y a presque pas de contact entre le parent payeur et l'enfant. Cette obligation a souvent des répercussions importantes sur la capacité du parent payeur de s'acquitter de ses obligations financières envers les enfants d'une seconde union ou d'une union subséquente. La mesure a également été décriée comme une restriction injuste du pouvoir discrétionnaire du parent non cohabitant de décider comment répartir ses ressources financières.

Concernant leur rôle, les parents divorcés n'ont pas droit aux mêmes choix que les parents non divorcés. Les parents divorcés peuvent être forcés à payer les coûts de l'éducation postsecondaire de leurs enfants d'âge adulte. Contrairement à ceux qui ne sont pas divorcés, les obligations financières des parents divorcés à l'égard de leurs enfants ne prennent pas fin lorsqu'ils atteignent l'âge de la majorité. (Cynthia Marchildon, réunion 13, Toronto)

De nombreux témoins ont demandé que la Loi sur le divorce soit modifiée afin que la définition d'« enfant à charge » n'inclus pas les enfants majeurs qui suivent des études postsecondaires, sauf s'ils sont handicapés ou ont des besoins spéciaux. D'autres témoins ont par ailleurs suggéré que les lignes directrices

autorisent dans ces cas le versement des pensions alimentaires directement à l'étudiant ou à l'établissement d'enseignement. À l'inverse certains précisent que les enfants de parents divorcés souffrent souvent d'un désavantage sur le plan du financement de l'éducation postsecondaire. Sans avoir examiné à fond le sujet puisqu'il ne fait pas partie du mandat strict du Comité, les membres désirent attirer l'attention sur la question en vue de discussions futures, mais aussi souligner le contre-argument, soit que les enfants de parents divorcés risquent de moins pouvoir continuer leur éducation si la définition d'« enfant à charge » n'est pas modifiée. Comme l'a expliqué le professeur Bala :

Les enfants de parents divorcés ont énormément de difficulté à faire des études postsecondaires. [...] À mon avis, il est extrêmement important d'avoir des dispositions juridiques à cet égard. Je crois qu'il serait opportun de modifier la loi de manière à ce que l'argent soit versé directement à l'enfant adulte. En fait, certains juges interprètent déjà la loi en ce sens. Si vous voulez préciser la loi et le dire explicitement, je pense que ce ne serait pas mauvais. Toutefois, je vous exhorte à ne pas éliminer cette obligation, mais simplement à la redéfinir. (Réunion 6)

La « règle des 40 p. 100 » contenue dans les lignes directrices soulève une autre inquiétude. Cette règle prévoit que, lorsque le conjoint payeur exerce son droit de visite auprès d'un enfant ou en a la garde pendant au moins 40 p. 100 du temps au cours d'une année donnée, le montant de la pension alimentaire n'est pas déterminé uniquement en fonction des montants figurant dans la table⁵⁵. Dans ces circonstances, le tribunal tiendra compte des montants de la table, des coûts plus élevés associés à la garde partagée, ainsi que des ressources, des besoins et, d'une façon générale, de la situation des parents et de l'enfant. Cette disposition très contestée avait pour but de conférer une reconnaissance juridique aux coûts accrus assumés par le parent non cohabitant qui consacre une grande partie de son temps à l'enfant. Comme l'ont fait remarquer un certain nombre de témoins, la règle a eu l'effet contraire d'encourager les parents, qui normalement se seraient entendus, à se quereller au sujet de l'horaire de cohabitation⁵⁶.

La règle des 40 p. 100 qui figure actuellement dans la loi a pour effet concret, même si c'est par inadvertance, de violer le premier principe [que deux parents compétents devraient partager la responsabilité de leur enfant]. En effet, elle assortit une incitation financière à la responsabilité partagée des parents. Dans l'état actuel des choses, le parent qui a la garde des enfants, et c'est généralement la mère, est incité à éviter que l'autre parent ne contribue aux responsabilités envers les enfants pour plus de 40 p. 100 du temps afin qu'il demeure totalement responsable du soutien financier. Et cela vaut même si le parent qui a la garde a des revenus plus élevés que l'autre. Le parent qui n'a pas la garde, généralement le père, est incité à chercher à participer plus activement aux responsabilités envers les enfants, qu'il le veuille ou non ou y soit préparé ou non, afin d'échapper à la responsabilité unilatérale du fardeau financier. Au cours de la dernière année, je n'ai jamais rencontré autant de mères et de pères se battant autour de cette règle de 40 p. 100 afin d'essayer de protéger leurs intérêts financiers, même au détriment de leurs enfants. (Howard Irving, médiateur, réunion 11)

Autre aspect de ce problème : les lignes directrices continuent de ne pas prendre en considération les dépenses du parent non gardien qui subvient aux besoins de l'enfant et en assume les soins durant les visites. Les parents gardiens, même ceux qui passent moins de 40 p. 100 de leur temps avec leur enfant, sont eux aussi susceptibles d'engager d'importantes dépenses. En fait, c'est ce qu'ils devraient être encouragés à faire dans le cadre de leur rôle de parents responsables.

55 Article 9, Lignes directrices fédérales sur les pensions alimentaires pour enfants, DORS/97-175.

Ce problème a été récemment admis par le Tribunal ontarien (Division générale) dans l'affaire Rosati c. Della Penta (1997(35 RFL (4e)102), où le juge Eberhard a conclu, à la page 104, que la règle des 40 p. 100 du temps prévue à l'article 9 des lignes directrices avait distrait les parties des vraies questions de garde et avait entraîné la discussion vers la détermination de la garde en fonction des questions de pension plutôt que vers la détermination de la pension en vue de faciliter la garde et les droits de visite (p. 104).

Les lignes directrices concernant la pension alimentaire des enfants devraient reconnaître les coûts fixes [assumés par le parent non gardien]. Peu importe que vos enfants soient ici aujourd'hui et demain, et au domicile de l'autre parent le lendemain, ils doivent avoir un lit, un toit, des jouets et ainsi de suite. Certains coûts sont fixes, que vous ayez vos enfants pour le week-end ou qu'il s'agisse d'une garde véritablement partagée. (Marina Forbister, Equitable Child Maintenance and Access Society, réunion 20, Calgary)

Plusieurs témoins ont convenu que le chiffre de 40 p. 100 était trop arbitraire, citant des cas où des pères ayant passé jusqu'à 38 p. 100 de leur temps avec leurs enfants devaient quand même payer le plein montant figurant dans la table des lignes directrices. Selon la plupart de ces témoins, il faudrait reconnaître les dépenses des parents non cohabitants en fonction d'une fourchette de 20 à 40 p. 100 du temps, pour autant que les dépenses soient déterminées comme étant significatives. Les dépenses de ces parents lorsqu'ils vivent à une distance considérable de leurs enfants peuvent être particulièrement lourdes et ne devraient être passées sous silence. Le Comité se préoccupe, pour des raisons d'équité, de la règle des 40 p. 100 et de l'absence, dans les lignes directrices, d'une prise en compte des grandes dépenses liées aux responsabilités parentales. Les membres du comité sont en autre déconcertés par l'effet négatif qu'a eu la règle des 40 p. 100 sur les négociations et les décisions ayant trait à l'exercice des responsabilités parentales. Des témoins ont demandé au Comité de recommander que le gouvernement étudie davantage cette question pour corriger ces aspects des lignes directrices.

Le présent Comité, tout comme le Comité sénatorial des affaires sociales, ont entendu quelques témoins s'élever contre l'injustice perçue d'avoir à déterminer le montant de la pension alimentaire pour enfants uniquement à partir du revenu du parent payeur sans tenir compte du revenu du parent qui reçoit cette pension. Le critère qui servait, avant l'adoption des lignes directrices, à déterminer le montant de la pension à payer par le parent non gardien — la répartition des coûts de l'éducation de l'enfant entre les parents en fonction de leur capacité relative de payer — semble plus raisonnable et plus acceptable. De même, les dispositions des lignes directrices ayant trait aux renseignements financiers, dispositions qui obligent le payeur à produire régulièrement des rapports financiers pour le conjoint bénéficiaire, ne visent que le parent payeur. Cette iniquité apparente choque les parents non cohabitants qui ont l'impression qu'on s'occupe des préoccupations des parents gardiens ou parents cohabitants principaux dispensateurs des soins alors que le gouvernement ne fait rien pour régler leurs problèmes d'exécution du droit de visite des parents non cohabitants. Marina Forbister de l'Equitable Child Maintenance and Access Society a exprimé ce point de vue :

Les lignes directrices pour la pension alimentaire des enfants devraient tenir compte du revenu des deux parents. Cet aspect a été largement débattu lors de la mise en oeuvre des lignes directrices. On a laissé entendre qu'il s'agirait d'un ensemble de lignes directrices basées uniquement sur le revenu du parent non gardien. Cette question a suscité beaucoup de controverse et elle est perçue par les Canadiens comme étant injuste. (Réunion 20, Calgary)

Toutes les provinces n'ont pas, dans leur adaptation des lignes directrices, suivi l'exemple fédéral. Au Québec par exemple les tables dans les lignes directrices du Québec se fondent sur le revenu des deux conjoints. À Terre-Neuve, on exige une divulgation mutuelle des renseignements financiers. Comme l'a fait remarquer David Day, avocat du droit de la famille à St. John's, en vertu des règles de procédure civile de pratiquement toutes les provinces et tous les territoires, il est possible par l'intermédiaire d'avocats ou par une requête au tribunal d'obtenir la divulgation des renseignements financiers de l'un ou l'autre parent.

Deux autres questions connexes ont été portées à l'attention du Comité. L'une d'elles est la nature obligatoire et non discrétionnaire des lignes directrices. Même s'ils le désirent, les parents ne sont pas libres de se soustraire à l'application des tables établissant le montant des pensions alimentaires et aux autres dispositions. Les juges n'émettront d'ordonnances ou de jugements relatifs à la pension alimentaire que s'ils sont convaincus du respect des lignes directrices. Cette restriction à la liberté des parents de régler leur

différend par un accord a été considérée par certains comme une restriction déraisonnable à la capacité des parents de prendre les arrangements qu'ils jugent appropriés pour leur famille après une séparation.

Le Comité est également préoccupé par les répercussions de l'application des lignes directrices sur les parties qui reçoivent des prestations d'aide sociale. Dans certaines parties du Canada, a-ton précisé au Comité, un parent qui reçoit une pension alimentaire peut être réputé recevoir le montant de la pension alimentaire prévu en vertu des lignes directrices, même si l'ordonnance alimentaire n'est pas respectée. Il en résulte que le montant de la pension alimentaire sera automatiquement déduit des prestations d'aide sociale de ce parent, ce qui peut priver la famille des ressources financières appropriées en cas de non-paiement de la pension alimentaire. Bien que l'administration des programmes d'aide sociale ne soit pas du ressort du gouvernement fédéral, les membres du Comité ont estimé qu'il était important que les répercussions de l'application des lignes directrices sur ce type de revenu soient étudiées attentivement.

L'étude des lignes directrices fédérales sur les pensions alimentaires pour enfants ne relèvant pas au sens strict des attributions du Comité et le Comité n'ayant pas cherché activement à étudier cette question, la plupart des membres du Comité ont jugé qu'il n'était pas approprié de recommander au ministre de la Justice un moyen pour corriger les problèmes engendrés par les lignes directrices. En effet le Comité pense que certains témoins qui n'ont pas traité des questions liées aux lignes directrices ni, de façon plus générale, des pensions alimentaires pour enfants, l'auraient sans doute fait si on le leur avait demandé. Cependant, étant donné la quantité de données recueillies sur les préoccupations liées aux lignes directrices, le Comité a estimé que les objections des témoins devaient être examinées par le ministre de la Justice.

Recommandation

- 18. La loi obligeant le gouvernement fédéral à revoir les Lignes directrices fédérales sur les pensions alimentaires dans les cinq ans suivant leur entrée en vigueur, le Comité recommande que le ministre de la Justice en fasse dans les meilleurs délais un examen approfondi pour veiller à ce qu'elles reflètent le principe de l'égalité des sexes et le droit de l'enfant au soutien financier des deux parents, et à ce qu'elles tiennent particulièrement compte des préoccupations additionnelles du Comité, à savoir :
 - 18.1 l'utilisation, dans les Lignes directrices sur les pensions alimentaires, des concepts et des termes nouveaux proposés par le Comité;
 - 18.2 les répercussions du régime fiscal actuel concernant les pensions alimentaires pour enfants, d'une part, sur le caractère adéquat des pensions alimentaires pour enfants accordées aux termes des *lignes directrices* et, d'autre part, sur l'aptitude des parents à assumer leurs autres obligations financières, par exemple envers leurs enfants issus d'une union ultérieure;
 - 18.3 l'opportunité de tenir compte des revenus des deux parents, ou de leur capacité financière, dans le calcul du montant des pensions alimentaires pour enfants, y compris de la règle des 40 % servant à déterminer si l'entente parental constitue un « partage des responsabilités parentales »;
 - 18.4 la prise en compte des dépenses engagées par les personnes qui paient une pension alimentaire durant les périodes où elles s'occupent de leur enfant;
 - 18.5 la prise en compte des dépenses supplémentaires qu'un parent doit assumer à la suite du déménagement de l'autre parent avec l'enfant;

- 18.6 la contribution des parents aux besoins financiers des enfants adultes qui fréquentent un établissement d'enseignement postsecondaire;
- 18.7 la possibilité pour les parties de se soustraire par contrat à l'application des lignes directrices fédérales sur les pensions alimentaires;
- 18.8 l'effet qu'ont les lignes directrices sur le revenu des bénéficiaires de l'aide sociale.

(vi) La règle des « parents coopératifs »

Le paragraphe 16(10) de la *Loi sur le divorce* est connu comme étant la règle des « parents coopératifs » ou du « maximum de communication ». Il établit le principe selon lequel « l'enfant à charge doit avoir avec chaque époux le plus de contact compatible avec son propre intérêt » et exige que le tribunal tienne compte de la volonté de chaque parent de faciliter les contacts entre l'enfant et l'autre parent. Ceux qui sont en faveur de l'exercice conjoint du rôle parental ou de la garde partagée soutiennent que ce principe n'est pas suffisamment appliqué par les tribunaux et qu'il est même complètement négligé. Voici ce qu'avait à dire au Comité Bruce Haines, avocat pratiquant depuis 35 ans :

J'ai aussi vu l'article de la *Loi sur le divorce* qui affirme que, lorsqu'il examine une question de garde, le tribunal doit tenir compte du fait qu'un parent facilite les contacts. À ma connaissance, cet article n'a jamais été appliqué. J'ai lu tous les rapports sur le droit de la famille au pays, et on n'en parle pratiquement jamais. (Réunion 12, Toronto)

Les porte-parole des femmes, particulièrement celles qui travaillent avec les victimes de violence, s'opposent à la règle des « parents coopératifs », maintenant qu'en favorisant un maximum de communication on pourrait mettre les femmes et les enfants en danger. Ruth Lea Taylor, avocate en droit de la famille et membre du Vancouver Coordination Committee to End Violence Against Women in Relationships, maintient que la disposition fait planer une menace sur les femmes victimes de violence familiale : elles risquent de perdre la garde si elles ne donnent pas de droit de visite à un conjoint violent (réunion 19). Elaine Teofilovici, du YWCA, a fait valoir que, dans le cas où un parent a subi de la violence conjugale, la disposition de la victime à faciliter le contact avec le parent violent ne doit pas être un facteur dans la décision relative à la garde. (Réunion 8)

Les membres du Comité estimant que les opinions divergentes au sujet de la règle des parents coopératifs ont chacune leur mérite respectif recommandent que le principe d'un maximum de communication soit inclu dans la liste des critères utilisés pour déterminer l'« intérêt supérieur de l'enfant » proposée par le Comité et soit ajouté à la Loi. Ainsi, le principe du maximum de communication serait pris en considération par les juges et les parents, mais pourrait être pondéré par d'autres critères importants relatifs à l'intérêt de l'enfant.

(vii) Exécution du droit de visite

Le droit de visite — son exécution, le refus d'exécution et le non-exercice de ce droit — est l'un des sujets les plus litigieux, les plus chaudement débattus et les plus souvent soulevés. La question a fait l'objet de multiples heures de témoignages, a rempli des pages et des pages de transcription et a donné lieu à de vifs échanges durant les séances. La question recouvre un certain nombre d'aspects : les mères empêchent-elles les pères d'avoir accès aux enfants? Les pères négligent-ils d'exercer leur droit de visite? Les tribunaux exécutent-ils les ententes et les ordonnances de droit de visite? Les visites sont-elles nécessaires ou avantageuses pour les enfants? Convient-il d'appliquer une solution punitive, ou une solution faisant

intervenir davantage de services? Est-elle susceptible de mieux servir l'intérêt de l'enfant? Ces interrogations traduisent l'une des plus profondes insatisfactions à l'égard du système du droit de la famille.

La division constitutionnelle des pouvoirs au Canada vient compliquer le problème de l'exécution du droit de visite. Comme on peut s'en douter, l'exécution du droit de visite n'est pas prévue dans la *Loi constitutionnelle de 1867*. D'une façon générale, l'exécution du droit de visite, tout comme l'exécution du versement des pensions alimentaires pour conjoints et pour enfants, a été traitée comme un pouvoir provincial sous la rubrique « La propriété et les droits civils dans la province ». Jusqu'à maintenant, toutes les mesures adoptées ou proposées au Canada en matière d'exécution du droit de visite ont été mises de l'avant au niveau provincial ou territorial.

Quelques témoins ont expliqué au Comité, que l'état actuel des choix, la question du droit de visite pose plus de problèmes pour les couples séparés ou divorcés que celle de la garde. Le Comité a entendu plusieurs récits amers au sujet du refus d'accès, d'accès contesté et de relations père-enfant coupées. Il reconnaît néanmoins que la majorité des ententes de visite fonctionnent relativement bien et sont appliquées sans incident. Malgré la foule de preuves anecdotiques reçues par le Comité au sujet du problème du refus d'accès, il existe peu de preuves empiriques sur le sujet. Une étude albertaine sur les droits de visite après la séparation des parents a conclu que, tandis que la plupart des parents non gardiens ne se sont pas vu refuser l'accès par le parent gardien ou par un tribunal, plus du tiers des parents, gardiens ou non, étaient d'avis que le parent non gardien ne visitait pas l'enfant ou les enfants autant qu'il l'aurait voulu⁵⁷. D'après la même étude, toutefois, beaucoup plus de parents non gardiens que de parents gardiens avaient l'impression que les interactions parentales en matière de droit de visite étaient difficiles et tendues.

Il est impossible pour le Comité de déterminer précisément quel problème est le plus répandu : le refus d'accès par les parents gardiens ou l'omission de l'exercice du droit de visite par les parents non gardiens. Il est toutefois évident que les deux ont des conséquences négatives s'ils ont pour résultat que l'enfant perd le contact avec l'un de ses parents. Le Comité se préoccupe des deux problèmes et regrette que, bien qu'il y ait eu de nombreuses solutions proposées pour faire face au problème du refus d'accès, très peu ou pas de solutions aient été proposées pour régler le problème du non-exercice des droits de visite. Les membres du Comité aimeraient promouvoir l'exercice régulier des droits de visite, par quelque moyen que ce soit, chaque fois qu'ils ont été reconnus comme servant l'intérêt de l'enfant.

Les pères ayant témoigné sur la question du refus d'accès ont souligné la douloureuse séparation qui en résulte entre eux et leur enfant. Dans les cas d'enfants très jeunes, une telle situation peut perturber la relation, parfois même irréversiblement. Les jeunes enfants dont le parent qui n'habite pas avec lui disparaît pendant une longue période pour des raisons inexpliquées souffrent énormément, se sentent trahis et abandonnés. De toute évidence, pareille conséquence s'oppose nettement à l'intérêt de l'enfant. Des parents ont prié le Comité de recommander des mesures grâce auxquelles les parents qui ont obtenu des droits d'accès par voie d'une ordonnance peuvent s'attendre à ce que ces droits soient appliqués.

Il faut faire appliquer ce qui a été convenu. Un enfant doit continuer à avoir des relations avec ses deux parents et ne pas être privé pendant des semaines et des mois, jusqu'à ce que tous les litiges soient réglés. Il faut modifier le fardeau de manière à permettre automatiquement aux enfants de voir leurs deux parents. Le droit de visite ne devrait pas faire l'objet de discussions et de contestations. L'enfant devrait avoir un droit inaliénable de visite. (Rick Morrison, Fathers for Justice, réunion 13, Toronto)

Debra Perry et al., « Access to Children Following Parental Relationship Breakdown in Alberta » (Calgary: Institut canadien de recherche sur le droit et la famille, 1992), p. xiii.

Par contre, certaines femmes et porte-parole des femmes ont fait valoir que l'omission des parents d'exercer leur droit d'accès est le problème le plus courant et celui qui est le moins susceptible d'être corrigé par des mesures d'exécution. Lorsque le droit de visite est irrégulièrement exercé, voire jamais, les parents gardiens ou cohabitants doivent composer avec des horaires perturbés, des enfants déçus et parfois des coûts accrus. Les témoins ont également signalé qu'il y a des occasions où le parent gardien doit, dans l'intérêt de l'enfant, empêcher l'accès à des moments particuliers, par exemple lorsqu'un enfant est malade, parce que la visite ne serait pas dans l'intérêt de l'enfant. Selon eux, il ne faut pas amoindrir le pouvoir du parent gardien d'exercer, dans les limites du raisonnable, un tel pouvoir discrétionnaire.

Pour chaque parent qui s'est vu privé d'un droit de visite, il y en a dix qui n'exercent pas ce droit. Ces parents ne sont pas poursuivis devant les tribunaux. À notre avis, c'est parce que l'on accepte cela comme la norme. (Claire McNeil, Dalhousie Legal Aid, réunion 30, Halifax)

Les solutions proposées par les témoins pour régler le problème du refus d'accès ont varié énormément. La plupart ont recommandé une série de réponses reconnaissant la nature compliquée des relations entre les parents après le divorce, la complexité de la vie des enfants et le besoin de traiter d'une façon délicate avec tous les participants dans le cas d'un problème d'accès. Par exemple, Joyce Preston, British Columbia Child Youth and Family Advocate, a recommandé une solution axée sur les services.

J'adopte toujours à l'égard de l'un ou de l'autre une solution axée sur l'enfant plutôt qu'une solution punitive. Certains ententes au sujet de la garde et du droit de visite semblent devoir être acrimonieuses pour toujours par exemple, « Nous ne nous entendrons jamais, et ce sera à chaque fois un combat », et je pense qu'il y a des façons de mettre sur pied des centres de service qui peuvent agir en tant qu'intermédiaires en ce qui concerne ces ententes et qui peuvent être attachés au système judiciaire ou quelque chose comme cela. Le recours au système punitif n'est jamais à l'avantage des enfants. Il punit en quelque sorte les adultes et il y a une escalade qui finit par une guerre et rien dans tout cela n'est à l'avantage des enfants. (Réunion 19, Vancouver)

La Section nationale du droit de la famille, de l'Association du Barreau canadien, a mis elle aussi en lumière la complexité de ces cas et a prôné une réponse non législative.

Je peux vous dire que, dans chacun des cas [où le parent qui avait la garde était accusé de refuser le droit de visite] dont je me suis occupé, il n'aurait pas été possible de recourir avec succès à une solution toute simple. Il s'agissait à chaque fois de situations complexes qui demandaient à être traitées selon les circonstances particulières. Parmi les services qui peuvent aider les parents, il faut noter les séances de conseils, les visites supervisées dans des conditions appropriées. Il faudrait aussi prévoir des fonds également pour la prestation de services de défenseurs des droits des enfants dans des circonstances appropriées. Il ne servira à rien ou à pas grand-chose de modifier la loi pour régler ce genre de problèmes. La prestation de services et de programmes et le dégagement d'un financement supplémentaire, par contre, sera utile. (Eugene Raponi, réunion 23)

L'ABC a toutefois reconnu le besoin d'habiliter les juges à ordonner une intervention policière dans des circonstances appropriées, afin de faire exécuter les droits de visite et la possibilité d'avoir recours au procès pour outrage dans les cas restreints où les parents empêchent l'accès et que le problème ne peut se régler par la médiation ou par des programmes d'éducation. Cependant, étant donné l'effet traumatique du recours à la force policière pour l'exécution du droit de visite⁵⁸, l'ABC a également recommandé qu'un certain nombre d'agents dans chaque corps policier reçoivent une formation spécialisée, susceptible de les aider à traiter efficacement ces situations.

D'autres témoins ont fait allusion au rôle du « coordonnateur des responsabilités parentales » utilisé par certaines administrations américaines. Les services de ce coordonateur sont mis à la disposition des parties à des moments pertinents pour résoudre les conflits au fur et à mesure de leur apparition.

Il faudrait pouvoir faire appel à un facilitateur lorsque le droit de visite est refusé — pas un assesseur ni un médiateur, mais un facilitateur. À 19 heures le mercredi soir, quand on vous refuse le droit de visite à vos enfants, vous devriez pouvoir appeler une personne pour vous plaindre, afin de trouver une solution immédiatement et non pas six semaines et 3 000 \$ plus tard, tout cela pour exposer votre cas devant un juge qui va ajourner pour six autres semaines. Je ne veux plus entendre de telles histoires. Je veux voir mes enfants à 19 heures le mercredi. (Wayne Allen, Kids Need Both Parents, réunion 13, Toronto)

Plusieurs témoins ont cité le modèle en vigueur en Illinois, conformément au *Unlawful Visitation Interference Act*, et selon lequel :

Quiconque ne respecte pas les dispositions d'une ordonnance du tribunal sur les droits de visite lorsqu'il a la garde de l'enfant ou qui retient ou cache un enfant dans le but de priver une autre personne de son droit de visite est coupable d'une infraction aux droits de visite. (Cité par Grant Wilson, Mississauga Children's Rights, réunion 12, Toronto)

Certaines exceptions sont prévues : lorsque le parent gardien a posé l'acte pour protéger l'enfant d'un dommage physique imminent, pour autant qu'il était raisonnable de croire en un danger imminent ou que l'acte ait été posé avec l'accord mutuel des parties ou autrement autorisé par la loi.

On peut envisager d'autres solutions en réponse à un refus déraisonnable par le parent gardien de laisser le droit de visite s'exercer telles que l'orientation vers des services de conseil ou l'éducation parentale, notamment sur la question de l'aliénation parentale et ses conséquences nuisibles pour les enfants, une évaluation par un professionnel de la santé mentale reconnu, une révision obligatoire des arrangements parentaux, le paiement d'une amende, l'emprisonnement du parent gardien et l'inversion automatique de garde. Le Comité note que plusieurs de ces options prêtent à controverse étant donné que leur impact potentiel sur les enfants risque d'être plus dommageable qu'utile. Plusieurs témoins ont proposé une solution pratique quoique partielle au problème des conflits relatifs au droit de visite : ils ont recommandé la création d'une banque nationale de données sur les ordonnances en matière de garde et de droit de visite (ou, en vertu du nouveau régime proposé, sur les ordonnances de partage des responsabilités parentales), banque qui permettrait aux policiers appelés à faire exécuter une ordonnance de déterminer immédiatement si celle qu'on leur a présentée est la plus récente.

Il a été observé qu'il n'est pas souhaitable d'élaborer de nouveaux et rigoureux mécanismes d'exécution pour les ordonnances prises en vertu de la *Loi sur le divorce*, en l'absence de mécanismes uniformes dans les provinces conformément à la législation provinciale du droit de la famille. Pour ce qui est d'une réponse punitive, le Comité note que, jusqu'à un certain point, un tel recours fondé sur l'infraction existe déjà. Les tribunaux peuvent en effet condamner pour outrage au tribunal un parent qui refuse d'obtempérer à une ordonnance d'accès. La nature des peines appliquées à une personne condamnée pour outrage au tribunal dans les cours canadiennes depuis 1980 a varié de l'ordonnance de paiement des coûts de conseil familial à l'application de « temps de compensation », à l'imposition d'une amende et finalement à l'incarcération dans des cas extrêmes. En outre, l'article 127 du *Code criminel* a été porté à l'attention du Comité par Linda Casey de Helping Unite Grandparents and Grandchildren (réunion 12). Cet article fait de la désobéissance à une ordonnance du tribunal un acte criminel.

Le Comité est d'avis que la meilleure solution au problème du refus d'accès découle d'une collaboration du gouvernement fédéral et de toutes les provinces et territoires en vue de trouver une réponse qui n'est plus

Voir, par exemple, l'affaire Fergus c. Fergus, de l'Ontario en 1997, 33 RFL (4e) 63 (Ont. CA), où l'utilisation répétée de la police par le parent non gardien pour l'exécution du droit de visite a eu un effet humiliant et préjudiciable sur les enfants et a ultimement conduit à la destruction de leurs rapports avec le parent non gardien.

seulement punitive et qui est appliquée à la grandeur du pays pour tous les types d'ordonnances visant l'exercice des responsabilités parentales. Le Comité estime que la mise en place de mécanismes permettant de résoudre rapidement les conflits portant sur les dispositions relatives au temps parental dans les ententes ou ordonnances parentales sera un élément clé pour atténuer les conflits entre les parents.

Recommandations

- 19. Le Comité recommande que le gouvernement fédéral travaille avec les provinces et les territoires à élaborer une réponse nationale coordonnée, comportant des éléments thérapeutiques et punitifs, lorsqu'il y a refus de se conformer aux ordonnances. Parmi les mesures qui pourraient être envisagées, citons l'intervention précoce, un programme d'éducation parentale, une politique permettant le compensation du temps, des services d'orientation à l'intention des familles où les parents ne s'entendent pas sur l'éducation des enfants et la médiation; dans le cas de parents intraitables des mesures punitives pourraient être prises à l'égard de ceux qui enfreindraient illégalement les ordonnances parentales.
- 20. Le Comité recommande que le gouvernement fédéral établisse un registre national informatisé des ordonnances parentales.

(viii) Demandes d'ordonnances parentales par les grands-parents

La question des demandes d'ordonnances parentales par les grands-parents a souvent été abordée mais devra trouver une réponse au niveau provincial concerné. Les parlementaires savent depuis longtemps que certains groupes de grands-parents sont insatisfaits de l'actuelle disposition de la *Loi sur le divorce* qui leur permet de demander à la cour la garde ou des droits de visite d'un de leurs petits-enfants mais qui exige qu'ils obtiennent l'autorisation du tribunal⁵⁹. Cette exigence est considérée superflue et coûteuse pour les grands-parents.

Les membres du Comité ont trouvé particulièrement pénibles les témoignages de grands-parents auxquels on a refusé le contact avec leurs petits enfants après le divorce, la séparation ou la mort de leur propre enfant. En effet, plusieurs membres sont des grands-parents eux-mêmes et peuvent facilement compatir avec les témoins. Toutefois en enlevant dans la *Loi sur le divorce* l'obligation d'obtenir l'autorisation du tribunal on n'aidera que les grands-parents dont l'enfant est actuellement dans une situation de divorce. Les autres grands-parents devraient continuer à s'en remettre aux lois provinciales, dont la plupart les autorise déjà à présenter une demande au tribunal sans préalablement en obtenir l'autorisation. Annette Bruce de l'Orphaned Grandparents Association a fourni la ventilation suivante pour ce qui est des grands-parents avec qui elle a travaillé:

Ce phénomène [le refus du droit de visite des petits-enfants] se répartit comme suit : unions de fait, 26 p. 100, divorce, 40 p. 100, familles intactes, 17 p. 100, décès des enfants adultes, 10 p. 100, et conflit avec un ou plusieurs parents, adoption par un beau-père ou une belle-mère, etc., 17 p. 100 environ. (Réunion 20, Calgary)

L'idée de faire des grands-parents parties automatiques (ou presque automatique) aux divorces pose un problème constitutionnel car le pouvoir fédéral en matière de droit de la famille se limite aux dispositions

⁵⁹ Article 16(3), Loi sur le divorce.

relatives au mariage et au divorce, y compris les mesures accessoires. C'est l'une des préoccupations qui a peut-être mené les membres du Comité permanent de la justice et des questions juridiques, de la Chambre des communes, à rejeter le projet de loi C-232 d'initiative parlementaire présenté en décembre 1995 par la députée réformiste de l'époque Daphne Jennings. Mme Jennings (qui n'est plus députée) a témoigné devant le Comité à Vancouver et a appuyé le projet de loi très semblable récemment présenté à titre privé par le député libéral Mac Harb⁶⁰.

Le Comité a trouvé le témoignage des grands-parents et de leurs représentants extrêmement convaincants. Toutefois, le Comité a également entendu des témoignages émouvants sur l'importance dans la vie des enfants des frères et soeurs, des demi-soeurs et des autres membres de la famille élargie. Constatant que les membres de la famille et les amis peuvent aussi ètre des personnes importantes dans la vie d'un enfant, certain membres du Comité ont jugé qu'il ne devrait pas y avoir de présomption législative à l'effet que les grands-parents occupent une position particulière par rapport à ces autres personnes importantes en matière de demande d'ordonnance parentale.

Afin de reconnaître le rôle important des grands-parents, on pourrait préciser l'importance des relations petits-enfants-grands-parents pour le bien-être de l'enfant dans la liste proposée des critères concernant l'intérêt supérieur de l'enfant. Cette solution qui serait peut-ètre moins sujette à une constestation constitutionnelle permettrait de faire écho au principe formulé par un certain nombre de témoins, selon lequel les relations établies entre l'enfant et ses grands-parents devraient être protégées et que la présence de grands-parents peut enrichir la vie de l'enfant. Un tel critère pourrait être évalué en fonction de tout risque éventuel posé à un enfant par un grand-parent particulier ou de toute ingérence perçue par rapport aux responsabilités décisionnelles de l'un ou l'autre des parents à l'égard de l'enfant. Voici ce qu'a recommandé Patricia Moreau de la Canadian Grandparents' Rights Association :

Nous suggérons que la *Loi sur le divorce* dispose que cette relation soit présumée être dans l'intérêt de l'enfant et que, par conséquent, elle ne soit pas perturbée à moins qu'on puisse démontrer à un tribunal qu'elle n'est pas dans l'intérêt de l'enfant. (Réunion 9)

Le Comité a tenu plusieurs longues discussions sur les représentations faites au nom des grands-parents — tous les membres du Comité sans exception ont été touchés par ces dernières, mais tous n'ont pas tiré les mêmes conclusions quant aux solutions les plus appropriées à recommander. Le Comité a décidé de recommander que les préoccupations des grands-parents soient prises en considération de deux façons. Premièrement, le Comité a recommandé que l'importance des relations petits-enfants-grands-parents soit incluse dans la liste des critères législatifs qui servira à orienter ceux qui auront à prendre des décisions en vertu du critère de l'intérêt de l'enfant en matière d'exercice conjoint du rôle parental (voir la recommandation 16). Deuxièmement, l'importance des relations avec les grands-parents et les autres membres de la famille élargie doit être prise en considération dans l'élaboration d'ententes parentales (recommandation 12).

Le Comité laisse entendre que d'autres solutions aux problèmes soulevés par les grands-parents nécessiteront l'intervention des gouvernements, des provinces et territoires. Les groupes de grands-parents ont informé le Comité que trois provinces au moins, l'Ontario, le Nouveau-Brunswick et l'Alberta, envisagent l'adoption de lois conçues pour promouvoir le maintien des relations entre les grands-parents et leurs petits-enfants lorsque ces relations sont dans l'intérêt de l'enfant. Les grands-parents du Québec ont déjà

⁶⁰ Projet de loi C-340.

un recours, à l'article 611 du Code civil⁶¹ :

Cet article donne des droits aux grands-parents et ces droits sont indépendants des situations. Ailleurs au Canada, on semble régir l'accès aux grands-parents dans le cadre de la Loi sur le divorce. Le divorce est peut-être l'une des causes qui éloignent les grands-parents de leurs petits-enfants, mais ce n'est pas la seule. J'apprécie le fait que chez nous, indépendamment du divorce, il y a cet article du Code civil qui garantit aux grands-parents l'accès naturel aux petits-enfants, sauf évidemment s'ils sont incestueux ou s'il y a des raisons valables que nous ne défendrions pas. Albert Goldbert, GRAND Québec, réunion 15, Montréal)

Les membres invitent les autres provinces à prendre note du libellé de l'article 611 du Code civil du Québec qui stipule que les père et mère ne peuvent sans motifs graves faire obstacle aux relations personnelles de l'enfant avec ses grands-parents.

Recommandation

21. Le Comité recommande que les gouvernements provinciaux et territoriaux envisagent de modifier leur législation familiale de manière à ce qu'elle stipule qu'il est dans l'intérêt des enfants de maintenir et d'encourager les relations avec les grands-parents et les autres membres de la famille élargie, et que ces relations ne doivent pas être perturbées sans une raison valable liée au bien-être de l'enfant.

2. Autres contributions fédérales

Les membres du Comité mettent en évidence que l'amélioration de la situation des enfants dont les parents divorcent ne peut incomber uniquement au ministère fédéral de la Justice. C'est une question à plusieurs volets, et des solutions devront être trouvées au gouvernement fédéral de même qu'à d'autres niveaux administratifs. Les recommandations formulées dans le présent rapport reflètent la complexité du problème ainsi que les réponses multidimensionnelles qui s'imposent.

(i) Le leadership fédéral

Bon nombre de témoins qui ont comparu devant le Comité ont exprimé une même préoccupation : améliorer le sort des enfants dont les parents divorcent dépend dans une large mesure de la disponibilité des ressources nécessaires. La plupart des nouveaux programmes en place au Canada, qu'il s'agisse de programmes d'éducation des parents, de programmes de résolution pacifique des conflits, d'interventions thérapeutiques ou de nouveaux programmes dans le cadre des procédures judiciaires, sont actuellement de portée limitée à cause d'un financement limité. Le Comité est d'avis qu'une des formes d'aide mesurable que le gouvernement fédéral peut apporter aux enfants du divorce consiste à offrir des ressources selon les besoins, pour que ces mesures bénéfiques puissent être mises à la disposition d'autant d'enfants et de familles que possible.

Selon bien des témoins, loin de ne toucher que l'aide juridique, le manque de ressources pour les programmes d'aide juridique en matière civile partout au Canada est un obstacle à l'amélioration de la

[«] Les père et mère ne peuvent sans motifs graves faire obstacle aux relations personnelles de l'enfant avec ses grands-parents. À défaut d'accord entre les parties, les modalités de ces relations sont réglées par le tribunal. ».

situation d'un grand nombre de familles. Depuis le début des années 90, le financement de l'aide juridique pour les causes familiales a diminué dans toutes les provinces du Canada. Certains témoins, inquiets de l'actuelle insuffisance des fonds d'aide juridique en matière civile, ont décrit la dévastation financière subie par leur famille en raison des coûts juridiques, ainsi que les difficultés et les dépenses accrues que les parties non représentées entraînent pour eux et pour les autres. Parmi les problèmes connexes, notons l'accès restreint des individus aux conseils juridiques, conseils qui pourraient les aider à prendre leurs propres décisions parentales; l'issue des disputes en matière de garde et de droit de visite est alors moins satisfaisante. Les parties à un litige en droit de la famille sont parmi les personnes les moins susceptibles de pouvoir se payer une bonne représentation. Pour les couples qui es séparent, les questions financières prennent de plus en plus d'ampleur, et non l'inverse. Un couple qui essaie de faire la transition d'un à deux foyers risque de ne pouvoir se payer d'assistance juridique et de s'en passer comme si c'était un luxe. Or, le Comité craint que, sans une bonne représentation juridique, les Canadiens ne puissent peut-être pas bénéficier de la protection offerte par notre loi actuelle sur le divorce ni même, en fait, des éventuelles améliorations qui leur seront apportées.

Des témoins venant de différents milieux professionnels ont précisé que les conseils juridiques accessibles et abordables pourraient très bien constituer une mesure d'économie pour les individus et pour la société. Les parents qui comprennent la législation et qui connaissent leurs droits et leurs obligations juridiques sont plus en mesure de faire eux-mêmes des arrangements parentaux durables ou de les négocier par l'intermédiaire d'avocats. Comme l'a fait valoir le professeur Bala, un bon avocat ne devrait pas être considéré comme un luxe.

Tout au moins dans certains cas, un avocat est une nécessité. En fait, il arrive que le fait d'avoir un avocat permette non seulement de conseiller les gens et de protéger leurs droits économiques et sociaux, mais aussi de réduire les tensions. Un bon avocat de droit familial peut donner toute une gamme de conseils judicieux aux gens. (Réunion 6)

Plus le cas est compliqué, plus les ressources d'aide juridique deviennent souvent nécessaires. Grâce au financement de l'assistance juridique, on peut obtenir des évaluations de qualité en matière de garde et de droit de visite, ce qui aide les parents et guide les juges. Et si les lignes directrices ou les tarifs le permettent, ce financement pourrait également servir à la médiation. Ce qui est encore plus important, la représentation juridique, financée au besoin par des régimes d'aide juridique, uniformise les règles du jeu pour les parties à un litige. La présence d'un avocat de service dans les tribunaux où l'on entend des affaires de droit familial serait l'une des façons les moins dispendieuses de garantir aux individus une assistance judiciaire de base. Comme l'a dit Keith Wilkins, du Régime d'aide juridique de l'Ontario, l'avocat de service « fournit des conseils rapides lors de la comparution et permet souvent de mener des négociations qui conduisent à des règlements très tôt dans la procédure ». (Réunion 12, Toronto) Ce modèle est actuellement en place dans les tribunaux de la famille de l'Ontario de même que dans ceux d'autres administrations. Dans le récent *Civil Justice Review* de l'Ontario, on a recommandé l'expansion du programme à la Division générale de la Cour de l'Ontario⁶².

Les présentations les plus frappantes sur les effets désastreux d'un financement insuffisant d'aide juridique et sur l'absence d'assistance judiciaire en matière civile sont venues de l'Île-du-Prince-Édouard. Presque tous les témoins ont mentionné cette absence d'aide : l'assistance n'est disponible que dans les situations urgentes où il y a menace de violence. Anne Sherman, de la Community Legal Information Association de l'Île-du-Prince-Édouard, a précisé qu'un programme restreint est financé par la Law Foundation de l'Île-du-Prince-Édouard qui offre jusqu'à 500 \$ (ou, dans les cas exceptionnels, jusqu'à 1 000 \$) par client, selon le principe du premier arrivé premier servi. Il y a également des avocats aux Health and Social Services qui peuvent aider les clients bénéficiaires d'aide publique à obtenir des pensions

⁶² Ontario Civil Justice Review, Supplement and Final Report (Toronto: novembre 1996), p. 139.

alimentaires pour enfants. Daphne Dumont, avocat de l'Île-du-Prince-Édouard en droit de la famille, a fait un vibrant plaidoyer pour qu'il n'y ait pas de changement législatif avant que les personnes concernées, c'est-à-dire les parties à un litige en droit de la famille, aient accès à l'assistance judiciaire.

Les enfants souffrent lorsque leur famille ne peut obtenir d'aide juridique. Sans accès au système judiciaire, tous les nouveaux droits conférés par les lois restent lettre morte. [...] Mieux vaut laisser les choses telles quelles plutôt que de faire miroiter devant les citoyens les plus démunis des garanties inaccessibles. En fait, puisque toutes les nouvelles lois dépendent de leur interprétation, si vous modifiez la *Loi sur le divorce* et créez de nouvelles normes d'accès, vous invaliderez des précédents bien établis et donnerez aux parents une nouvelle panoplie de lignes directrices non définies sur lesquelles débattre. Avant de prendre une mesure aussi radicale, assurez-vous que les parents de familles pauvres aient les ressources nécessaires pour participer au débat qui s'ensuivra nécessairement si vous modifiez la *Loi sur le divorce*. (Réunion 31, Charlottetown)

Le Comité est d'avis que l'insuffisance de l'aide juridique est un problème nécessitant une étude plus poussée.

Le Comité reconnaît qu'une aide financière du gouvernement fédéral, à laquelle s'ajouteraient des contributions provinciales et territoriales s'impose pour diverses initiatives telles une augmentation du financement de l'aide juridique accrue en matière civile, l'élargissement d'un régime de tribunaux unifiés de la famille partout au Canada, à la nomination d'un nouveau commissaire à la protection de l'enfance, qui ferait rapport au Parlement. La création de cette nouvelle fonction permettrait de promouvoir les intérêts de l'enfant en vertu de la *Loi sur le divorce* et des autres mesures de compétence fédérale. Le Comité est aussi d'avis que la représentation des enfants par un avocat, lorsque ce dernier est nommé par un juge, est un service important qu'on ne saurait refuser à un enfant faute de soutien financier. Selon le Comité d'autres programmes devraient aussi recevoir un financement adéquat tels les programmes d'éducation des parents, les programmes de surveillance de l'exercice des responsabilités parentales ou du droit de visite et les programmes de perfectionnement professionnel en matière de procédures judiciaires liées au droit de la famille.

De nombreux témoins ont aussi réclamé qu'on élargisse les programmes de formation des juges afin de couvrir aussi la question des arrangements parentaux après la séparation et insisté sur des aspects particuliers qui les préoccupent. Par exemple, les groupes qui représentent les grands-parents souhaiteraient que les juges soient davantage sensibilisés à l'importance pour les enfants du rôle des grands-parents et de la famille, les groupes de pères estiment que les juges devraient suivre une formation plus poussée sur l'importance des relations entre les enfants et leur père, et les groupes de femmes sont généralement d'avis que les juges ne sont pas suffisamment informés sur la violence dirigée contre les femmes et ses répercussions sur les enfants. Le Comité convient que ces sujets sont tous importants et que des juges mieux informés rendront des décisions meilleures et plus uniformes.

Cependant, compte tenu de la répartition constitutionnelle des pouvoirs et de l'importance de préserver l'indépendance de l'appareil judiciaire, il n'y a pas de latitude pour imposer voire même simplement recommander de la formation à l'intention des juges qui traitent de questions qui relèvent du droit de la famille. Il reste qu'il existe des programmes de formation sur ces sujets et d'autres encore. L'un d'eux est le volet destiné aux juges du programme national annuel de droit de la famille, organisé par la Fédération des professions juridiques du Canada. Les juges qui participent à ces programmes seraient probablement grandement intéressés par certaines des questions qui sont ressorties de la présente étude. Là où le gouvernement fédéral offre de la formation aux juges fédéraux spécialisés dans le droit de la famille dans la mesure où il finance des programmes destinés aux juges nommés par le gouvernement fédéral, le Comité propose que l'on s'efforce d'intégrer de plus en plus aux programmes réguliers de formation des magistrats

les préoccupations soulevées par les témoins devant le Comité et des questions relatives aux répercussions du divorce sur les enfants. Les provinces devraient aussi envisager de suivre cette suggestion.

Recommandation

- 22. Le Comité recommande que le gouvernement fédéral fasse preuve de leadership en prévoyant les budgets nécessaires, c'est-à-dire en affectant des ressources suffisantes aux mesures suivantes, considérées par le Comité comme essentielles à l'élaboration, en matière de droit de la famille, de politiques et de pratiques davantage axées sur l'intérêt des enfants :
 - 22.1 Développement de tribunaux unifiés de la famille dans l'ensemble du pays, incluant l'affectation de ressources importantes aux interventions et aux programmes visant à assurer le respect des ordonnances parentales, tels les programmes d'intervention précoce, l'éducation parentale, les politiques permettant le compensation du temps, les services d'orientation aux familles et aux enfants, et les services de médiation;
 - 22.2 Accès à l'aide juridique en matière civile afin que l'absence ou l'insuffisance de l'aide juridique ne soit pas préjudiciable aux parties visées par les demandes contestées d'ordonnances parentales;
 - 22.3 Création d'un poste de « commissaire à la défense de l'enfant » qui relèverait du Parlement et dont le titulaire serait chargé de veiller au bien-être et aux intérêts des enfants dans le cadre de l'application de la *Loi sur le divorce* et dans d'autres domaines de compétence fédérale, ainsi que de les promouvoir;
 - 22.4 Prestation des services d'un avocat chargé de représenter l'enfant, lorsqu'un juge en a décidé ainsi;
 - 22.5 Élaboration de programmes d'éducation parentale;
 - 22.6 Création de programmes de visites surveillées;
 - 22.7 Pour les juges, de meilleures possibilités de perfectionnement professionnel, ce dernier étant orienté sur le principe du partage des responsabilités parentales énoncé par le Comité, l'impact du divorce sur les enfants et l'importance de préserver les rapports entre les enfants et leurs parents et les membres de la famille élargie.

(ii) Les tribunaux unifiés de la famille

Il y a eu un consensus au sujet du concept des tribunaux unifiés de la famille — tribunaux qui exercent leurs compétences à l'égard des lois fédérales et provinciales sur la famille. La plupart des témoins ont reconnu l'utilité de tribunaux spécialisés ayant compétence pour entendre tous les cas touchant le droit familial, particulièrement là où la fonction juridique de la cour doit composer avec des services connexes de

thérapie et de médiation⁶³. Les avocats qui pratiquent dans les juridictions où siègent des tribunaux unifiés de la famille ont expliqué qu'ils pouvaient renvoyer, d'entrée de jeu, leurs clients à des conseillers affiliés au tribunal, lesquels conseillers pouvaient souvent obtenir des règlements à l'amiable, particulièrement dans le cas de problèmes comme des conflits de droit de visite ou des demandes de modification.

Les tribunaux unifiés de la famille sont répartis partout au Canada. Les premiers ont été établis à St. John's (Terre-Neuve) et à Hamilton (Ontario) en 1977. Le provinces ne sont pas habilitées, en vertu de l'article 96 de la *Loi constitutionnelle de 1867*, à accorder à un juge nommé au niveau provincial une juridiction analogue à celle exercée par un juge fédéral. Pour entendre des causes relevant de la législation fédérale, comme des demandes de divorce, ou pour accorder certains types de redressement limités au domaine des juges de la Cour supérieure (comme un redressement par injonction), les juges des tribunaux unifiés de la famille doivent être sous la présidence de juges nommés par le gouvernement fédéral. Ces tribunaux ne peuvent donc être établis que par une coopération fédérale-provinciale.

Des tribunaux unifiés de la famille sont présentement en activité partout au Nouveau-Brunswick et en Saskatchewan⁶⁴, de même qu'à Winnipeg, dans cinq villes de l'Ontario (une nouvelle expansion a été annoncée et est maintenant en voie de négociation par les gouvernements fédéral et provincial) et à St. John's. Les tribunaux ne sont pas tous unifiés de la même façon. Ainsi, la St. John's Unified Family Court n'entend pas de causes relatives à la protection des enfants, et tous les tribunaux ne sont pas associés au même type de services non juridictionnels. Dans d'autres provinces comme le Québec et dans certaines villes ontariennes, il existe, au sein des tribunaux, des juges ou des divisions spécialisées en droit de la famille. Le gouvernement fédéral a annoncé que des fonds seront disponibles pour 27 nouveaux juges de tribunaux unifié de la famille en mars 1998.

Le Comité reconnaît l'avantage pour les Canadiens, et particulièrement pour leurs enfants, que les disputes parentales soient résolues par de compétents spécialistes de la justice, particulièrement si les affaires de droit familial régies par différentes lois, comme la garde et l'accès et la protection des enfants, peuvent être entendues en même temps et traitées dans une seule et même cour. Plus important encore le Comité estime que la combinaison des services de litiges et des services de conseil est susceptible de produire des effets positifs pour les enfants dont les parents divorcent. Par conséquent, il faut promouvoir dans toute la mesure du possible au Canada le modèle du tribunal unifié de la famille.

Certains témoins ont transcendé l'actuel modèle du tribunal unifié de la famille à usages multiples en proposant d'autres types de centres de services visant à aider les familles à se réorganiser après la séparation. Par exemple, Sharon O'Brien, présidente du PEI Advisory Council on the Status of Women, a prôné l'établissement d'un « organisme de règlement des conflits familiaux » qui « procéderait à la première évaluation des dossiers, renverrait les gens vers les services appropriés et diffuserait de l'information à jour sur les programmes et les services » (Réunion 31, Charlottetown) D'après le Comité, ce type de centre de services serait avantageux, qu'il se trouve dans le cadre d'un tribunal unifié de la famille ou à l'extérieur.

Le Comité convient en général qu'il faudrait accélérer l'élargissement des tribunaux unifiés de la famille au Canada. La majorité des membres de Comité sont d'accord avec la conclusion du rapport de la Commission de réforme du droit du Canada, *Rapport sur le droit de la famille*, selon laquelle les tribunaux unifiés de la famille constituent le meilleur mécanisme pour réduire les coûts et la confusion attribuables à la

64 Dans les deux provinces, les causes de droit familial sont entendues par la Division du droit de la famille de la Cour supérieure provinciale.

⁶³ A fait exception à la règle l'avocat Tony Merchant, qui a affirmé à Regina que les tribunaux unifiés « séquestrés », comme ceux de Hamilton et de St. John's, ont obtenu moins de succès que les juges spécialisés présidant des tribunaux civils généraux, selon le modèle en vigueur en Alberta, en Colombie-Britannique et dans plusieurs districts judiciaires de l'Ontario.

fragmentation des compétences constitutionnelles en matière de droit de la famille. Comme la Commission de réforme du droit, le Comité est particulièrement conscient de l'avantage d'offrir des services non contentieux aux parents et aux enfants dans les bureaux des tribunaux unifiés de la famille. Par conséquent, le Comité recommande que tous les tribunaux unifiés de la famille offrent des services de soutien, dont des services de counselling pour les familles et les enfants, d'éducation juridique du public, de médiation et d'évaluation, et aient un bureau où seraient entendus les points de vue des enfants en difficulté à cause de la séparation ou du divorce de leurs parents. Ces tribunaux devraient aussi offrir des services de surveillance des cas hautement conflictuels en cours de procédures judiciaires et de surveillance de la mise en oeuvre et en application des ordonnances de partage des responsabilités parentales.

Toutes les provinces ont, à divers degrés, adopté une importante innovation de procédure qui consiste à recourir à la gestion de cas ou à une intervention judiciaire précoce. La présidente de la section nationale du droit de la famille de l'ABC, Heather McKay, a décrit l'éventail de ces programmes.

Pratiquement toutes les provinces canadiennes ont adopté des méthodes de résolution des différends qu'elles tentent de mettre en œuvre avant de porter l'affaire devant les tribunaux. Ces démarches comprennent notamment la médiation, les conférences préparatoires, les négociations à quatre avec conseillers et avocats, les séances de conseils avec des psychologues et les évaluations bilatérales concernant la garde des enfants. (Réunion 23)

Conjugués à la médiation, ces mécanismes offrent une foule de tribunes nouvelles de règlement des différends qui, ensemble, ont grandement facilité l'adoption de solutions rapides et peu coûteuses pour toutes sortes de problèmes qui relèvent du droit de la famille.

Un juge de la Colombie-Britannique, Thomas Gove, a décrit le fonctionnement du système de conférences dirigées par un juge médiateur, institué à l'origine dans les cas de protection de l'enfance et dont l'application a récemment été étendue aux différends au sujet de la garde et du droit de visite (réunion 38). Des juges formés comme médiateurs aident les parties à s'entendre à l'amiable. On pense que le recours à des juges médiateurs incite les gens à en arriver à une entente plus rapidement que lorsque le médiateur n'est pas un juge. Ces conférences présentent l'avantage de faire participer un plus grand nombre de personnes, notamment les enfants de plus de 12 ans ou les enfants plus jeunes si le juge l'ordonne, les grands-parents ou d'autres membres de la famille, des représentants des organisations autochtones, des défenseurs, des avocats et, au besoin, des travailleurs sociaux. Très peu de familles qui ont eu recours à ce système ne sont pas arrivées à s'entendre, ce qui réduit le nombre de procès. Ce système est avantageux non seulement pour les familles concernées, mais aussi pour les contribuables.

D'autres provinces ont institué des systèmes analogues. En Ontario, des avocats spécialisés en droit de la famille font office d'agents bénévoles de résolution des différends et rencontrent les personnes qui sollicitent une révision des modalités de leur divorce pour les aider à s'entendre. Toujours en Ontario, une conférence en présence d'un juge est obligatoire avant que les parties concernées comparaissent devant un juge relativement à une requête relative à la garde ou au droit de visite des enfants. À la division provinciale et à la division générale de la Cour de l'Ontario, la conférence avant procès est obligatoire pour toutes les affaires qui relèvent du droit de la famille. Presque partout au Canada on a recours à des rencontres avant procès où le juge encourage les parties à s'entendre à l'amiable en leur donnant une idée de l'issue probable du procès.

Dans un numéro récent de *Civil Justice Review*⁶⁵ paru en 1996, on proposait un système élargi de gestion des cas pour l'Ontario. On y recommandait notamment la création de trois types de conférences en matière de droit civil : les conférences de cas, les conférences de règlement et les conférences de gestion des procès. On

⁶⁵ Ontario Civil Justice Review, p. viii-ix.

recommandait également l'établissement de règles de prise en charge des cas dans l'ensemble de la province d'ici l'an 2000.

Le Comité est encouragé par la créativité et l'ingéniosité dont ont fait preuve les diverses provinces dans l'élaboration de divers modèles d'intervention judiciaire précoce. On pourrait ajouter au système de gestion des cas des bureaux juridiques semblables à ceux qui existent à plusieurs paliers de compétence aux États-Unis — et connus sous le nom de coordonnateur des responsabilités parentales; ces bureaux se verraient confier les cas de mésentente grave et suivraient leur progression dans le processus judiciaire. Les agents de ces bureaux sont souvent chargés de régler des conflits concernant les périodes de garde et de visite.

Lorsque les demandes de partage des responsabilités parentale en vertu de la *Loi sur le divorce* sont entendues par des tribunaux unifiés de la famille, il est important, selon le Comité, que les règles de ces tribunaux donnent préséance aux questions de droit de la famille touchant aux enfants sur les questions d'ordre financier comme la division de la propriété ou les cas ne mettant pas en cause l'intérêt de l'enfant.

Beaucoup de personnes ont signalé que les retards dans les procès qui relèvent du droit de la famille exacerbent les problèmes dans des situations déjà difficiles. Le Comité s'inquiète particulièrement de l'impact, sur les relations parent-enfant, de longues périodes d'attente durant lesquelles il n'y a pas de contact significatif. On admet cependant qu'on ne peut pas précipiter indûment le règlement des différends acrimonieux en matière de garde. Dans nombre de cas, pareilles situations exigent souvent l'intervention de psychologues et de travailleurs sociaux qui ont besoin de passer un minimum de temps avec les membres de la famille pour produire un rapport contenant des conclusions valables.

Dans l'État du Michigan, les tribunaux ont au plus 56 jours pour entamer l'audition des causes de garde ou d'accès. Le juge John Kirkendall a précisé cependant que ce délai est considéré davantage comme une ligne directrice que comme une obligation.

Les experts en développement de l'enfant nous ont apprises, que bouleverser inutilement la vie d'un enfant est une des pires choses qu'un tribunal ou autre puisse faire. Donc, lorsque quelqu'un se présente devant le tribunal pour demander un changement, c'est comme un signal d'alarme pour nous. Nous ne voulons rien changer à la vie d'un enfant sans en savoir plus long sur la situation. Nous renvoyons donc ces affaires à l'Ami du tribunal qui peut devoir demander l'intervention de quelqu'un d'autre, auquel cas il se peut que nous devions attendre le rapport. La Cour suprême et la Cour d'appel nous ont indiqué que si nous n'arrivons pas à régler ces affaires dans le délai imparti, nos ordonnances n'en seront pas moins valides pour autant. C'est simplement qu'on voudrait instaurer une bonne pratique en essayant de faire en sorte que ces affaires soient jugées à titre prioritaire. La Cour suprême voudrait que nous nous en occupions dans le délai prévu; elle nous l'a ordonné. Je pense que c'est une façon de dire que les affaires qui concernent la garde des enfants sont extrêmement importantes et que les juges devraient leur accorder la priorité, et c'est ce que nous faisons. (Réunion 26)

La majorité des témoins conviennent que les problèmes d'accès doivent être réglés dans les meilleurs délais afin d'en minimiser les répercussions fâcheuses sur les relations entre l'enfant et le parent qui n'en a pas la garde. La Fondation du Barreau du Québec avait par exemple recommandé en 1997 l'adoption d'une procédure accélérée pour les affaires de violation d'un droit de visite ou lorsque le droit de visite pose des problèmes d'exécution (Roger Garneau, réunion n 4). La Fondation a aussi recommandé que, dans les cas où l'on prévoit des problèmes d'exécution des ordonnances de droit de visite, le juge présidant demeure saisi du dossier, automatiquement ou à la demande des parties, pendant plusieurs mois, après quoi il ferait le bilan de la situation. D'autres témoins ont recommandé que les questions concernant les enfants soient traitées à part des autres questions litigieuses entre les parents qui se séparent afin de stabiliser la situation plus rapidement dans l'intérêt des enfants.

De plus, les règles devraient décourager le recours aux instances *ex parte* (en l'absence d'un parent) sauf en cas d'extrême urgence. Bien des témoins ont parlé du tort causé aux familles par des décisions *ex parte* et du fait que le parent absent n'ait pu être suffisamment entendu pour compenser le préjudice subi à la suite de la décision initiale. À cause de la nature des procédures du droit de la famille, où la plupart des témoignages sont très subjectifs, il est particulièrement capital que les juges entendent les deux parties avant de rendre des décisions importantes.

Certains témoins ont fait valoir au Comité qu'il devrait y avoir d'autres services en complément ou en alternatives aux services non-juridiques disponibles par l'unification des tribunaux de la famille. Ils ont mentionné en effet qu'il vaudrait mieux parfois confier à un tribunal administratif et non aux tribunaux judiciaires les décisions relatives aux responsabilités parentales, ou tout au moins certains aspects du processus. Une de ces recommandations émanait d'un avocat, Michael Cochrane :

Je suis maintenant persuadé, après avoir fait l'expérience du système actuel, qu'une famille devrait pouvoir se présenter devant une espèce de tribunal du droit de la famille qui adopterait une approche multidisciplinaire pour l'aider à régler les questions liées aux finances, aux enfants et à tout ce qui peut comporter un problème pour elle, peut-être même le rôle des grands-parents. Cette équipe multidisciplinaire pourrait être composée d'un avocat, d'un comptable ou planificateur financier et d'un spécialiste du travail social ou de l'aide à la famille. Quels que soient ses besoins, la famille devrait pouvoir compter sur des experts. Ce genre d'aide — et je devrais peut-être ajouter l'éducation du public à la liste — serait peut-être beaucoup plus utile que des avocats et des juges grassement rémunérés. (Michael Cochrane, avocat et auteur, réunion 13, Toronto)

Le Comité est d'avis qu'il faut approfondir l'idée d'un tribunal administratif qui serait chargé de certaines fonctions de prise de décisions. Selon le Comité, une telle instance se verrait confier les responsabilités suivantes : intervenir dans les conflits entre parents sur le partage du temps parental; aider les enfants touchés par ces conflits; offrir un service d'information et d'orientation aux parents et aux enfants; s'assurer de l'application des ordonnances de soutien aux enfants ou de partage du temps parental; et aider les parents à s'adapter avec le temps aux ententes parentales. Ces fonctions non juridictionnelles pourront être exercées plus facilement et à moindre coût à l'extérieur des tribunaux, mais il est clair que les tribunaux continueront à exercer au besoin leurs fonctions juridiques. Même si ces fonctions étaient confiées à des entités administratives séparées, il faudrait, selon le Comité, que les bureaux de ces dernières soient situés sur les lieux des tribunaux unifiés de la famille ou qu'ils y soient affiliés.

Recommandations

- 23. Le Comité recommande que le gouvernement fédéral continue de travailler avec les provinces et les territoires afin d'accélérer l'établissement de tribunaux unifiés de la famille ou de tribunaux semblables dans tous les districts judiciaires du Canada.
- 24. Le Comité recommande que, en plus d'exercer leur fonction juridictionnelle, les tribunaux unifiés de la famille offrent divers services de soutien hors-instance pouvant inclure les suivants :
 - 24.1 conseil aux familles et aux enfants;
 - 24.2 éducation juridique publique;
 - 24.3 évaluation du rôle des parents et services de médiation;

- 24.4 services ayant pour fonction d'entendre et d'aider les enfants qui éprouvent des difficultés à la suite de la séparation ou du divorce de leurs parents;
- 24.5 services de gestion de cas veillant à l'application des ordonnances de responsabilité parentale partagée.
- 25. Le Comité recommande que, dans la mesure du possible, les autorités provinciales et territoriales, les barreaux et les administrateurs des tribunaux s'efforcent de privilégier, parmi toutes les affaires ayant trait au droit de la famille, celles qui concernent les demandes de responsabilité parentale partagée.
- 26. Le Comité recommande que, pour les questions concernant l'exercice des responsabilités parentales aux termes de la *Loi sur le divorce*, on reconnaisse et on fasse valoir l'importance de la présence des deux parties lors de toutes les procédures, et que l'on évite dans la mesure du possible les procédures *ex parte*.

B. Les responsabilités constitutionnelles des provinces

1. Exécution des ordonnances relatives au droit de visite

Le Comité a recommandé l'application, dans l'ensemble du Canada, d'une méthode uniforme et coordonnée qui garantirait l'exécution des ordonnances de droit de visite rendues aux termes de la *Loi sur le divorce* et des lois provinciales et territoriales en matière de droit de la famille, comme le meilleur moyen de répondre aux préoccupations exprimées par les témoins (voir la recommandation 19). Cette solution exigerait la coopération de tous les gouvernements. Dans la présente partie, le Comité examine les mesures qui ont été ou qui pourraient être prises par les provinces ou territoires pour répondre au problème que constitue le refus de droit de visite.

Les tribunaux peuvent rendre une condamnation pour outrage au tribunal à l'endroit d'un parent ayant la garde des enfants qui refuse à l'autre parent l'exercice de son droit de visite. En outre, certaines provinces ont déjà adopté des mesures législatives traitant spécifiquement de l'exécution des ordonnances portant droit de visite. Par exemple, la *Provincial Court Act* de l'Alberta prévoit une amende d'au plus 1 000 \$ ou une peine de prison pour les contraventions à une ordonnance de garde ou de droit de visite⁶⁶. Aux termes de la *Family Relations Act* de la Colombie-Britannique, quiconque contrevient à une ordonnance de droit de visite sans excuse légitime⁶⁷ commet une infraction et peut être poursuivi au criminel.

En 1989, l'Ontario a adopté, mais non promulgué, l'article 34a de la Loi portant réforme du droit de l'enfance, lequel aurait institué un recours pour tout refus injustifié d'exercice du droit de visite en permettant aux tribunaux d'accorder un droit de visite compensatoire, d'exiger la surveillance de la garde ou des visites, d'ordonner le remboursement de dépenses raisonnables ou de nommer un médiateur pour régler les problèmes d'accès. Il est cependant précisé expressément que les dispositions sur l'exécution des ordonnances relatives au droit de visite ne s'appliquent pas aux ordonnances rendues en vertu de la Loi sur le divorce. Les mêmes dispositions existent à l'article 41 de la Children's Law Act de Terre-Neuve et à l'article 30 de la Children's Law Act des Territoires du Nord-Ouest.

Selon la *Children's Law Act* de la Saskatchewan, le tribunal peut, en guise de recours pour refus injustifié d'exécution d'une ordonnance de droit de visite, ordonner des visites compensatoires, exiger la surveillance

⁶⁶ Art. 3(8).

⁶⁷ Art. 128.

de l'exercice du droit de visite, ordonner au parent qui a la garde de verser une caution, nommer un médiateur et rendre ou modifier une ordonnance de garde ou une ordonnance de droit de visite (article 26). Un parent ayant un droit de visite qui ne l'exerce pas ou qui ne ramène pas l'enfant chez lui au moment prévu peut, si cela est dans l'intérêt de l'enfant, être forcé de verser une caution au parent qui a la garde ou de fournir une adresse ou un numéro de téléphone. Le tribunal peut aussi ordonner la surveillance des visites, la nomination d'un médiateur ou la modification d'une ordonnance de garde ou de droit de visite. Le refus d'exercer un droit de visite ou de respecter une ordonnance de droit de visite ou de ramener l'enfant chez lui comme il était prévu n'est pas considéré comme illégitime s'il est justifié par un motif valable et si un préavis a été donné. En outre, la loi confère aux tribunaux de la Saskatchewan le pouvoir de condamner quelqu'un pour outrage au tribunal⁶⁸.

Certains témoins, notamment un grand nombre de parents qui versent une pension alimentaire mais n'hébergent pas habituellement leurs enfants, reprochent aux gouvernements du Canada d'avoir institué dans chaque province un système public d'exécution des ordonnances alimentaires où des ressources publiques sont consacrées à la perception des pensions alimentaires pour enfants. Ces personnes estiment que les gouvernements devraient consacrer autant d'attention et de ressources à l'exécution des ordonnances portant droit de visite et qu'il devrait exister à leur intention un organisme public gratuit chargé de régler les différends en matière de droit de visite. La plupart des gouvernements provinciaux hésitent à donner suite à ce genre de réclamation, peut-être parce qu'il existe un lien plus direct entre le paiement des pensions alimentaires pour enfants et les budgets provinciaux dans la mesure où les prestations des assistés sociaux qui bénéficient d'une pension alimentaire sont réduites du montant de la pension perçue et parce qu'il semble y avoir moins de problèmes au niveau de l'exercice du droit de visite qu'au niveau du paiement des pensions alimentaires. Dans une étude du procureur général du Manitoba citée par l'Association du Barreau canadien, on a analysé les demandes de services d'exécution du droit de visite et des pensions alimentaires et on a observé que 85 p. 100 des demandes d'aide concernaient des pensions alimentaires et 15 p. 100 portaient sur des problèmes de droit de visite et visite et des pensions alimentaires et on a observé que

En 1989, le Manitoba a lancé un projet pilote financé conjointement par le gouvernement fédéral et provincial appelé Programme d'assistance en matière de droit de visite. Il a été financé conjointement par les deux gouvernements pendant trois ans, puis par le seul gouvernement du Manitoba pendant un an. Le programme visait à aider les familles à résoudre leurs différends en matière de droit de visite et offrait les services de conseillers et comportait un volet judiciaire.

Certains témoins prônent un modèle d'intervention thérapeutique et conciliatoire dans les cas où le droit de visite a été refusé ou non exercé. Ils estiment que les solutions punitives comme l'incarcération du parent délinquant ou l'imposition d'une amende à celui-ci va à l'encontre de l'intérêt de l'enfant. Comme l'ai fait remarquer le juge à la retraite Herbert Allard, anciennement de la Cour provinciale de l'Alberta :

Cela présente le même genre de difficulté que l'emprisonnement d'un homme pour défaut de versement d'une pension alimentaire. C'est totalement vain. Une fois que cet homme sera en prison, vous ne pourrez certainement pas en obtenir de l'argent. Le recours a des sanctions telles que l'emprisonnement pour ce que l'on pourrait considérer comme un outrage civil ne constitue donc pas un dilemme nouveau, et il n'y a jamais de solution facile. En Alberta, en vertu de la *Summary Convictions Act* (Loi sur les poursuites sommaires), nous avons condamné des hommes et des femmes pour outrage au tribunal. Mais cela ne change pas grand chose à quoi que ce soit. (Réunion 20, Calgary)

Ces dispositions sont en grande partie modelées sur le Uniform Custody and Access Jurisdiction and Enforcement Act préparé par le Comité fédéral-provincial-territorial du droit de la famille et la Conférence sur l'uniformisation des lois du Canada en 1998.

⁶⁹ Étude du procureur général du Manitoba citée dans le mémoire de l'Association du Barreau canadien, p. 12.

Parmi les propositions plus prometteuses, mentionnons les programmes d'éducation des parents, les services de conseil personnalisés, la médiation, le rattrapage du temps perdu et la modification éventuelle des ordonnances de garde et de visite. De l'avis du Comité, lorsque les juges chargés d'appliquer les dispositions relatives aux périodes de garde ou de visite sont tenus d'envisager une gamme de solutions, les chances sont meilleures que le dénouement soit plus profitable pour l'enfant que si les seules options du juge sont d'imposer une amende ou faire incarcérer un parent.

La question de l'exécution du droit de visite a récemment été débattue par le professeur James McLeod dans un commentaire afférent à la cause B.(L.) c. D.(R.), où une mère a été condamnée à 60 jours de prison pour outrage au tribunal⁷⁰. Dans cette affaire, il a été déterminé que la mère, qui avait la garde de l'enfant, avait délibérément refusé l'accès à l'enfant à au moins quarante occasions, en l'absence de tout motif valable. En fait, d'après le témoignage du personnel d'un programme de visites surveillées, la fillette était parfaitement à l'aise avec son père et avait même l'air d'être plus à l'aise avec son père qu'avec sa mère. Comme l'a fait remarquer M. McLeod, l'incarcération de la mère avait peu de chances de promouvoir l'exercice du droit de visite du père, mais le juge s'est senti obligé de rendre cette sentence pour signifier qu'on ne peut pas contrevenir en toute impunité à une ordonnance judiciaire⁷¹.

Les représentants du Barreau du Québec ont proposé une solution intéressante qui exigerait la modification des règles qui gouvernent la procédure judiciaire mais sans qu'il soit nécessaire de modifier la loi. Rapportant les résultats d'une étude réalisée en juillet 1997 par la Fondation du Barreau du Québec, M. Roger Garneau a signalé qu'il serait plus avantageux pour les parties et leurs enfants de remplacer les poursuites pour outrage au tribunal en cas de contravention à une ordonnance de droit de visite par une démarche plus simple à la procédure moins compliquée.

La Fondation recommande que le justiciable, au lieu d'avoir recours à l'outrage au tribunal, arme inutile et belliqueuse qui existe, mais qui est souvent dangereuse d'utilisation en matière familiale—on suggère de la bannir—, ait plutôt recours à une simple requête qu'on adresserait au juge en Chambre lui disant: « Écoutez, il y a eu un jugement de rendu à telle date, mon client ou ma cliente a obtenu des droits d'accès à ses enfants, et il y a une partie, en l'occurrence le conjoint sans doute, qui fait obstruction. On vous demande, monsieur le juge ou madame le juge, d'intervenir rapidement pour corriger cela, non pas dans un mois, dans trois mois ou dans un an, mais dans quelques jours.» C'est une mesure possible qui exigerait un certain réaménagement dans l'organisation judiciaire des cours, mais qui n'exigerait aucune modification à la loi. Cela exige de la bonne volonté et un désir d'efficacité de la part des juges et des avocats. (Réunion 4)

Dans un rapport paru récemment, trois membres de l'Assemblée législative de l'Alberta ont conclu qu'on ne pouvait pas résoudre les problèmes d'accès de manière satisfaisante en recourant essentiellement à des mesures d'exécution de la loi. À leur avis, les enfants devraient avoir le droit à la présence continue de leurs deux parents dans leur vie et les parents devraient être tenus de dresser un plan général de la façon dont ils entendent s'acquitter de leurs responsabilités parentales envers leurs enfants. Le rôle du gouvernement devrait consister à « appuyer la restructuration des familles au moyen de services de consultation, de groupes de soutien des parents et de services de médiation qui, tous, donnent aux parties concernées la possibilité de trouver des solutions personnalisées adaptées à leurs besoins au lieu de se voir imposer une solution de l'extérieur » 72. Le Comité recommande par ailleurs la codification des sanctions que le tribunal peut imposer pour contravention à une ordonnance de garde ou à une ordonnance de droit de visite, comme cela a été fait dans certaines provinces. Les sanctions possibles retenues par le Comité comprennent :

^{70 35} RFL (4e) 241(Cour de l'Ontario(division provinciale))

⁷¹ *Ibid.*, p. 242.

⁷² MLA Review of the Maintenance Enforcement Program and Child Access, ministère de la Justice de l'Alberta, juin 1998, lettre de la députée provinciale Marlene Graham au ministre de la Justice, Jon Havelock, p. 2.

des ordonnances de visites surveillées, des ordonnances enjoignant à la police de trouver et de ramener l'enfant, le versement des pensions alimentaires à des fiduciaires, le dépôt d'un cautionnement avec ou sans sûreté personnelle, des amendes et peines de prison, la modification d'ordonnances de garde ou d'ordonnances de droit de visite, des ordonnances portant visite compensatoire, la nomination d'un médiateur, la participation à des cours d'éducation des parents et le remboursement des frais⁷³.

Le comité albertain a recommandé aussi que les sanctions éventuellement codifiées s'appliquent non seulement au refus du parent qui a la garde de respecter une ordonnance de droit de visite, mais aussi au refus d'exercer un droit de visite.

2. Problèmes de transfert

Les provinces pourraient aussi éventuellement intervenir pour répondre aux préoccupations des forces de police canadiennes, exposées par M. Vince Westwick, qui a comparu devant le Comité au nom du chef de police d'Ottawa Brian Ford pour le compte de l'Association canadienne des chefs de police :

Du point de vue de la police, c'est une situation extrêmement explosive qui ne peut pas en fait être résolue de façon positive. Il est difficile sinon impossible, pour l'agent de police, de régler le conflit à la porte de la maison. Si les avocats, les tribunaux et les médiateurs n'ont pas réussi à le faire, comment peut-on s'attendre raisonnablement à ce que l'agent de police y réussisse dans ces circonstances? Il est évident que l'agent sera critiqué par l'une ou l'autre des parties, quoi qu'il fasse [...] Nous aimerions qu'elles [les ordonnances] soient plus claires, rédigées en termes non juridiques, que les parties soient nommées et clairement identifiées, que le droit de visite soit indiqué de façon claire et concise dans un tableau semblable à un tableau d'amortissement qui indiquerait toutes les dates du droit d'exercice du droit de visite, en particulier dans les cas à risque élevé.

Finalement, il faudrait des dispositions, relevant peut-être d'une loi ou d'une politique provinciale, pour faire face aux problèmes qui se posent sur le terrain. Peut-être faudrait-il prévoir un fichier des historiques des cas de ce genre, auxquels les professionnels et la police pourraient se référer, en particulier en dehors des heures normales de bureau. (Réunion 24)

La création d'un registre national des ordonnances relatives à la garde et au droit de visite, comme l'a recommandé le Comité, pourrait répondre, au moins en partie, à cette dernière préoccupation. Quant à celle qui la précède, il faudrait pour y porter remède que les ordonnances soient rédigées en termes intelligibles pour les agents de police appelés à les faire respecter.

Recommandation

27. Le Comité recommande que les ordonnances de responsabilité parentale partagée soient plus détaillées et plus faciles à lire et à comprendre pour les agents de police chargés de les exécuter.

3. Sensibilisation aux responsabilités parentales et aux relations interpersonnelles

Selon certains témoins, la plupart des parents qui se séparent sont mal préparés à un divorce ou à une séparation et à leurs graves répercussions sur leurs enfants. Beaucoup estiment que, compte tenu du taux élevé

⁷³ *Ibid.*, p. 44.

de divorces, les futurs parents devraient recevoir un minimum de formation sur la résolution des conflits dans le mariage et après la séparation, le cas échéant. Certains témoins recommandent même que le divorce et les questions de responsabilité parentale figurent dans les programmes d'éducation familiale.

Je recommande que ces systèmes de soutien soient mis en place bien avant que les conflits naissent dans les familles. Autrement dit, je recommanderais que les parents suivent un programme d'initiation à la vie familiale, avant qu'ils ne soient amenés à établir des liens avec leur enfant dès sa naissance; il y a lieu de souligner l'importance des liens établis entre les parents et les enfants et les soins nourriciers. Je pense que l'on pourrait demander au système de santé publique de participer à ce processus. Cette sensibilisation pourrait être encore améliorée en introduisant l'initiation à la vie familiale dans les programmes éducatifs. (Kathy Thunderchild, travailleuse sociale, Réunion 20, Calgary)

D'autres témoins ont recommandé que l'on organise des campagnes de sensibilisation sur le danger qu'il y a à faire fi des besoins des enfants dans le contexte d'un divorce, et que l'on offre des programmes plus complets de préparation au mariage et des cours sur l'éducation des enfants à l'intention des nouveaux parents. Espérons que les travaux du Comité contribueront à mieux sensibiliser la population à cet aspect critique de la vie de la société canadienne.

Outre promouvoir une sensibilisation aux conséquences de la séparation et du divorce sur les enfants, le Comité estime important de soutenir les couples qui ne souhaitent pas en arriver à cette solution. Le comité sait qu'un certain nombre d'Églises et de groupes communautaires offrent déjà dans tout le Canada des programmes à l'intention de ces couples; il préconise donc la création d'un fonds spécial auquel ces groupes de bénévoles pourraient avoir recours pour obtenir des subventions de soutien. Grâce à des subventions relativement peu importantes, les groupes communautaires pourraient accroître l'accès à leurs programmes et contribuer ainsi aux efforts des parents eux-mêmes pour stabiliser et renforcer leurs relations de couple, ce qui, selon le Comité, est clairement dans l'intérêt des enfants.

Recommandations

- 28. Le Comité recommande que les provinces et les territoires cherchent de nouveaux moyens de sensibiliser le public à l'impact du divorce sur les enfants et, en particulier, à certains comportements des parents qui nuisent le plus aux enfants lors de la dissolution du mariage, et que ces programmes d'éducation soient mis en application. Dans la mesure du possible, le Comité recommande que le gouvernement fédéral contribue à un tel effort dans les limites de sa compétence et qu'il en assure en partie le financement.
- 29. Le Comité recommande que le gouvernement fédéral étende son soutien financier à des programmes communautaires visant des couples qui cherchent à éviter la séparation ou le divorce, ou à renforcer leur union.

C. Les deux paliers de gouvernement

1. Séparer les questions de pension des questions de droit de visite

Le paiement de la pension alimentaire et le privilège de passer du temps avec ses propres enfants sont, au Canada, deux éléments considérés comme tout à fait indépendants, dans l'usage et dans la loi. Cependant,

dans l'esprit d'un grand nombre, ces deux éléments sont liés dans les faits. Certains témoins ont demandé d'établir un lien entre les deux, à savoir que la pension alimentaire soit réduite voire même annulée dans les cas où le parent qui a la garde refuse à l'autre parent le droit de voir ses enfants; mais la plupart des témoins tiennent à ce que ces deux questions demeurent indépendantes l'une de l'autre. L'enfant a un besoin et un droit relativement à l'aide financière de ses deux parents qui ne doit en rien être touchée par les différends qui opposent ses parents ou par la conduite de l'un ou de l'autre au sujet des droits de visite.

2. Représentation légale des enfants

L'élargissement des programmes actuels offrant aux enfants les services de conseillers juridiques ou de protecteurs autres que des avocats exigera probablement la participation, financière et autrement, des deux paliers de gouvernement. Le Comité a recommandé une contribution du gouvernement fédéral à cet égard (voir la recommandation 22). Le Comité reconnaît qu'il est essentiel d'offrir aux enfants une certaine forme de représentation, particulièrement dans les cas de vifs conflits, et que la nature de cette représentation doit être déterminée au cas par cas. Il s'agit en fait d'un droit des enfants aux termes de la *Convention des Nations Unies sur les droits de l'enfance*. Certains témoins ont insisté sur ces droits, et d'autres, notamment une avocate de Calgary, Dale Hensley, ont conclu qu'il s'ensuit naturellement que les enfants devraient automatiquement avoir le droit de participer au procès qui concerne leur avenir :

[...] les enfants doivent avoir qualité dans toutes les décisions qui les touchent en vertu de la Loi sur le divorce. Ce doit être un droit absolu. Ce droit ne saurait être conditionnel à une formulation verbale ou à l'âge. La convention est claire à ce sujet. [...] les enfants devraient avoir droit à une représentation. S'il s'agit bien d'un forum juridique, il doit y avoir représentation juridique, et la cour doit avoir l'autorité pour demander la désignation d'un avocat ou d'un représentant pour l'enfant. Il y aurait plusieurs aspects inhérents à cette recommandation, nous le savons, mais cela est fondamental. Toutefois, l'idéal serait que les avocats soient nommés bien avant que l'un des parents n'entreprenne le processus juridique ou ne conteste. De toute évidence, il ne serait pas nécessaire que cette personne soit un avocat. (Réunion 20, Calgary)

Les témoins ne s'entendaient pas sur un âge précis au-delà duquel tous les enfants seraient capables de donner des instructions à un avocat. Cependant, la plupart admettent que tous les enfants de 12 ans ou plus pourraient le faire, et même les enfants plus jeunes, selon leur degré de maturité. Jeffery Wilson estime pour sa part que les avocats ont la responsabilité de déterminer si un client, adulte ou enfant, est compétent pour donner des instructions, et ils sont très capables de le faire. En ce qui concerne les enfants, il estime que plus les enfants sont jeunes, plus leur compétence est douteuse (réunion 25).

Dans certaines provinces, il existe déjà des programmes bien établis de services juridiques à l'intention des enfants concernés par des différends très difficiles au sujet de la garde et du droit de visite. En Ontario, le Bureau de l'avocat des enfants intervient au nom d'enfants dans environ 1 600 cas annuellement, même s'il ne peut pas intervenir dans tous les dossiers qui lui sont renvoyés par les tribunaux. (Les autres sont refusés faute de ressources). Ce bureau considère qu'il a pour devoir de représenter les souhaits et les intérêts de l'enfant devant le juge. Comme l'a dit un avocat des enfants, Wilson McTavish:

Pour être précis, nous ne représentons pas directement les intérêts de l'enfant et ce dernier ne nous donne pas ses instructions. Notre rôle est de représenter l'enfant par ordonnance du tribunal, en vertu des dispositions des articles 89 et 112 de la Loi sur les tribunaux judiciaires de l'Ontario. Nous ne sommes pas engagés par l'enfant et nous n'exigeons pas non plus que les parents ou que tout autre intervenant paient nos services professionnels. Il s'agit d'une charge publique financée intégralement par le procureur général de l'Ontario. Notre relation avec

l'enfant est celle qui caractérise un avocat et son client. Nous devons nous assurer que les éléments de preuve qui se rapportent aux souhaits de l'enfant, conformes ou non, sont portés à la connaissance de la cour, et nous replaçons ces souhaits dans le cadre de l'ensemble des témoignages. (Réunion 12, Toronto)

Ailleurs, et notamment dans toutes les provinces de l'Ouest, ce sont des défenseurs des enfants, et non pas toujours des avocats, qui représentent les enfants dans les cas de protection de l'enfance. Ces bureaux ne représentent pas les enfants dans les affaires de garde et de droit de visite, mais des représentants du *Canadian Council of Provincial Child Advocates* et de plusieurs bureaux provinciaux membres ont participé aux audiences du Comité en raison de leurs préoccupations quant à l'impact de ces questions sur les enfants. En fait, bien que les différends entre parents au sujet de la garde et du droit de visite des enfants ne relèvent pas de ces bureaux, les représentants ont tous fait état d'un nombre élevé de demandes de services de représentation de la part des enfants et de leurs parents.

La représentation des enfants n'est pas une chose nouvelle au Canada. Voilà 20 ans environ que l'on a des bureaux de représentation en faveur des enfants dans tout le pays. Au Québec et en Ontario, ils existent depuis la fin des années 70. L'Alberta a lancé son programme à la fin des années 80 et le Manitoba, la Saskatchewan et la Colombie-Britannique, se sont dotés de bureaux de représentation des enfants en 1992 et en 1995. Les représentants des provinces Maritimes et des Territoires du Nord-Ouest ont aujourd'hui entamé des négociations avec leurs gouvernements respectifs et l'on peut envisager la présence de ces bureaux dans l'ensemble des territoires et des provinces du Canada. [...] aucun des intervenants en faveur de l'enfance dans les provinces n'a le mandat de se porter à la défense des jeunes devant les tribunaux. En raison cependant du nombre et de l'urgence des conflits portant sur la garde et les droits de visite, les intervenants ont convenu de réagir ensemble et d'intervenir [à l'occasion des travaux du Comité]. (Judy Finlay, Bureau d'assistance à l'enfance et à la famille de l'Ontario, réunion 12, Toronto)

3. Déménagements

Lorsqu'un parent, généralement celui qui a la garde des enfants, décide d'aller s'installer dans une autre ville, cela suscite souvent des conflits avec l'autre parent. Cette situation a des conséquences particulièrement graves quand les distances sont grandes, mais même un déménagement de peu de portée sur le plan géographique peut avoir d'importantes répercussions sur l'exercice du droit de visite du parent qui n'a pas la garde des enfants. Dans la décision qu'elle a rendue en 1996 dans l'affaire *Gordon c. Goertz*, la Cour suprême du Canada a énoncé une série de principes devant s'appliquer à ces cas⁷⁴. Il ne doit exister aucune présomption favorable aux déménagements proposés par le parent qui a la garde, mais les tribunaux doivent rendre leur décision en prenant en considération tous les facteurs pertinents pour déterminer ce qui est dans l'intérêt de l'enfant.

Le professeur de droit Rollie Thompson a fait part au Comité des travaux de recherche qu'il a effectués sur les affaires mettant en cause un déménagement depuis la décision *Gordon c. Goertz*. Dans 65 p. 100 des 85 décisions rapportées, le tribunal a approuvé le déménagement proposé par le parent ayant la garde des enfants. Les tribunaux étaient plus portés à approuver un déménagement concernant un enfant de 6 à 11 ans que les déménagements concernant des enfants soit très jeunes, soit de 12 ans ou plus. Selon M. Thompson, ce genre de décision pose des problèmes dans la mesure où les parents et les avocats n'ont presque pas de balises. Or, il est encore plus difficile pour les parents de prendre des décisions s'ils ne peuvent pas avoir une idée de l'orientation probable de la décision d'un tribunal. M. Thompson propose que le parent qui a la garde soit tenu de démontrer que le déménagement est motivé par des raisons autres que le simple désir d'empêcher

⁷⁴ [1996] 2 R.C.S. 27.

l'exercice du droit de visite de l'autre parent et de proposer un horaire de visite révisé. Il incomberait alors au parent qui n'a pas la garde de l'enfant de démontrer pourquoi le déménagement ne devrait pas avoir lieu. Il a par ailleurs proposé que l'on traite différemment les cas où l'exercice de l'autorité parentale est largement partagé entre les parents, de même que les cas où les parties ont déjà négocié des restrictions en matière de déménagement dans une entente de séparation ou une ordonnance par consentement.

Plusieurs témoins ont dit au Comité que les parents qui ont la garde des enfants devraient avoir un droit présomptif de déménager avec l'enfant. Assurément, du point de vue d'un parent qui assure pratiquement la totalité des soins d'un enfant avec peu de participation du parent qui n'a pas la garde de l'enfant sinon aucune, il semble injuste que le parent qui n'a pas la garde puisse empêcher ou retarder un déménagement. Il reste cependant que ce facteur serait pris en considération par un tribunal.

D'autres témoins, notamment la section nationale du droit de la famille de l'Association du Barreau canadien a présenté un argument convaincant voulant qu'on impose un préavis de manière à ce que le parent qui a la garde des enfants et qui envisage de déménager soit tenu d'informer l'autre parent au moins 90 jours avant le déménagement proposé afin de ménager une période suffisamment longue pour éventuellement modifier le calendrier des visites, entamer des négociations ou même un procès au besoin. Le Comité estime qu'un déménagement ne devrait se faire qu'avec l'accord des parents ou avec l'approbation du tribunal, et qu'il serait souhaitable d'exiger un préavis.

Recommandation

30. Le Comité recommande que la *Loi sur le divorce* soit modifiée pour exiger a) qu'un parent souhaitant déménager avec un enfant à une distance qui exigerait que soient changées les ententes parentales ordonnées par le tribunal en demande l'autorisation à la cour au moins 90 jours avant le déménagement prévu et b) qu'un préavis soit donné au même moment à l'autre parent.

Pour la plupart des enfants, le fait d'avoir des parents qui vivent dans deux villes différentes est une situation extrêmement difficile. Une telle séparation paraît à première vue la plus lourde conséquence imaginable de la séparation des parents, mais pourtant, dans de nombreux cas, elle est inévitable pour des raisons financières ou d'autres. La liberté de se déplacer, particulièrement à l'intérieur du Canada, est un droit protégé par la Constitution, droit que les décisionnaires répugnent grandement à limiter. Quoi qu'il en soit, il importe de tenir compte de l'impact d'un déménagement sur les enfants. Par conséquent, pour garantir que le déménagement du parent qui a la garde des enfants n'entraîne pas la disparition de l'autre parent de la vie des enfants, certains témoins ont réclamé une modification des modalités financières afin de rendre possible des visites régulières coûteuses et d'autres contacts. Par exemple, Lane McIntosh a proposé une nouvelle forme d'allégement fiscal:

Je voudrais soumettre au comité une idée pragmatique, réalisable — et j'exhorte les membres du comité à la retenir — pour les parents qui sont séparés de leurs enfants. On pourrait leur permettre de déduire aux fins d'impôts les dépenses qu'ils encourent pour rendre visite à leurs enfants et vice-versa. Pourquoi diable n'est-ce pas déductible? Il serait parfaitement naturel que ce le soit [...] J'exhorte les membres du comité à retenir cette suggestion car cela encouragerait bien des gens à rendre visite à leurs enfants. (Réunion 32, Fredericton)

Bon nombre de membres du Comité estiment que cette suggestion mérite qu'on s'y attarde.

Les membres du Comité sont d'avis que, dans la plupart des cas où le parent ayant la garde déménage loin de l'autre parent, il est important d'examiner les pensions alimentaires versées aux enfants ou au conjoint.

C'est l'une des questions qui devrait être examinées par la ministre de la Justice lors de la révision des Lignes directrices fédérales sur les pensions alimentaires pour enfants et le Comité presse le Comité fédéral-provincial-territorial du droit de la famille d'envisager une façon d'exiger cet examen (voir la recommandation 18).

Un autre détail non négligeable a été signalé au Comité. Il concerne les enfants dont le parent qui en a la garde vit à l'étranger, mais qui reviennent au Canada périodiquement pour rendre visite à leur autre parent. Comme ils ne remplissent pas les conditions de résidence ouvrant droit à l'assurance-maladie, ils ne sont pas couverts pendant qu'ils sont au Canada. Le Comité propose que les provinces étudient aussi ce problème en vue d'offrir à ces enfants une forme quelconque de couverture, au moins pour de courtes périodes.

4. Les professionnels

De nombreux témoins ont parlé du rôle des professionnels dans les actions qui relèvent du droit de la famille, et plusieurs ont formulé de vifs reproches à leur endroit. Plusieurs témoins ont blâmé les avocats, les travailleurs sociaux, les psychologues ou les médiateurs pour l'issue fâcheuse de leur divorce. Il est évidemment inévitable que certains consommateurs soient déçus. Cependant, ces plaintes ont suscité des propositions qui pourraient s'avérer très avantageuses pour les parents et leurs enfants. Par exemple, dans la plupart des provinces, les travailleurs sociaux et les psychologues, en particulier ceux qui sont chargés d'évaluer la situation dans les cas de garde et de droit de visite, de même que les médiateurs familiaux, ne sont pas assujettis à des normes d'accréditation légiférées ni visés par un mécanisme les tenant responsables de leurs décisions. Il serait clairement utile d'intervenir à ce sujet dans certaines provinces du Canada.

Certains témoins avaient de nombreux griefs à l'égard des avocats, considérant que, à l'instar de leurs homologues du secteur de la santé mentale, ils ont créé une véritable « industrie du divorce », expression qu'ils utilisaient de façon nettement péjorative. Cette « industrie » n'aurait d'autre finalité que d'enrichir ces professionnels qui, pour parvenir à leurs fins, n'hésiteraient pas à promouvoir l'acrimonie chez les couples qui se séparent et à encourager des procès qui n'en finissent plus. Pour sa part, après avoir rencontré un nombre élevé et sans doute représentatif de professionnels du volet juridique et du volet de la santé mentale de « l'industrie du divorce », le Comité constate que ces groupes d'experts sont généralement composés de personnes bien intentionnées, hautement compétentes qui travaillent avec zèle. Le rapport de juillet 1997 de la Fondation du Barreau a révélé, contrairement à ce qu'on aurait pu attendre, un niveau élevé de satisfaction à l'égard des juges et des avocats.

Permettez-moi d'attirer votre attention sur quelques-unes des conclusions et recommandations de ce comité spécialisé de la Fondation. D'abord, à la surprise générale des juges et des avocats qui faisaient partie de ce comité, il s'est avéré que la très grande majorité des personnes divorcées qui ont été rencontrées avaient éprouvé une très grande satisfaction lors de leur expérience de divorce, satisfaction à l'égard des juges et de leurs avocats. (Roger Garneau, Barreau du Québec, réunion 4)

Aussi élevés que les frais juridiques puissent paraître aux intéressés et aussi décevant que puisse parfois être l'aboutissement des procédures, les avocats ne sont manifestement pas toujours à blâmer pour les problèmes dans le secteur du droit de la famille. Ils sont sujets à des conditions d'accréditation très strictes, et leur conduite est surveillée par les barreaux des provinces. La plupart des actions que les témoins reprochent à des avocats constitueraient clairement une contravention des règles d'éthique qui régissent les avocats et, dans les cas extrêmes, entraîneraient la radiation de l'avocat concerné du barreau. Cependant, les membres du Comité considèrent intéressantes les propositions des témoins concernant un mécanisme normalisé d'accréditation des autres professionnels.

Recommandation

31. Le Comité recommande que les provinces et les territoires de même que les associations professionnelles compétentes élaborent des normes d'accréditation s'appliquant aux médiateurs familiaux, aux travailleurs sociaux et aux psychologues qui font les évaluations des cas de responsabilité parentale partagée.

Barbara Chisholm, de l'Association des travailleurs sociaux de l'Ontario, a fait valoir l'importance, pour les avocats qui représentent des parents, de veiller aussi aux intérêts des enfants.

[...] il faut élargir la formation des avocats de manière à reconnaître que, dans les questions de droit de la famille, l'avocat qui représente un parent fonctionne dans l'ombre de l'avenir des enfants. Dès lors, ses obligations envers le parent qui est son client ne sont pas les mêmes que dans les autres domaines de sa pratique. (Réunion 13, Toronto)

Une avocate de Winnipeg, Susan Baragar, a abondé dans le même sens :

[...] je pense qu'il nous faut changer certains des éléments du code déontologique que suivent nos associations professionnelles, de telle sorte que nos responsabilités soient quelque peu différentes lorsqu'il est question d'enfants. Je pense que ce qu'il nous faut faire c'est déclarer que nous avons une responsabilité à trois volets. Nous avons une responsabilité en tant qu'agents de la cour; nous avons une responsabilité à l'égard de notre client; et nous devons également avoir une responsabilité à l'égard des enfants, qui sont sous-représentés dans ces affaires. (Réunion 22, Winnipeg)

Chapitre 5 : Complications inhérentes aux divorces très conflictuels

Les professionnels du droit et de la santé mentale conviennent que le divorce et la séparation affectent les parents et les enfants. Pour la majorité des familles, il s'agit d'une difficile période de transition. Certaines familles semblent toutefois ne pas pouvoir s'en sortir, l'un des parents ou les deux paraissant résolus à maintenir un tel degré de conflit et de tension qu'il devient impossible de prendre des décisions concernant les responsabilités parentales ou les biens sans une intervention majeure de la part des professionnels. On estime que ces cas représentent entre 10 et 20 p. 100 des divorces. Presque tous les intervenants en droit de la famille reconnaissent que chez bon nombre de ces couples les conflits sont tellement profonds qu'il n'y aura probablement jamais de solution judiciaire à leur problème. Ces couples perpétueront leurs rapports d'opposition peu importe les conséquences pour la vie de leurs enfants, leur remariage ou les frais juridiques exorbitants. Ces couples ne constituent évidemment pas la majorité, et un certain nombre de témoins ont insisté pour que l'on fasse en sorte que les recommandations concernant les divorces très conflictuels n'aient pas d'impact négatif sur les autres cas de divorce.

Carole Curtis, avocate pour l'Association nationale de la femme et du droit, a décrit les couples en profond conflit :

Je qualifie de très conflictuelle une famille dans laquelle il n'y a pas eu de véritable violence ou d'agression mais au sein de laquelle une relation hostile se poursuit après la séparation. Un thérapeute parlera éventuellement de relations dysfonctionnelles. Il y a bien des familles dans lesquelles les deux conjoints séparés sentent encore le besoin de se déchirer deux, cinq ou sept ans après la séparation. Nous ne devons certainement pas les oublier mais nous ne devons pas non plus nous faire des illusions sur l'aide que peut apporter notre système judiciaire et notre droit à ces familles. (Réunion 8)

Un certain nombre de témoins incluaient, dans la catégorie des divorces très conflictuels, les familles ayant vécu des situations de violence conjugale.

On a demandé au Comité de se concentrer sur des options pour aider les parents qui sont capables de prendre eux-mêmes des arrangements et d'arriver ensemble à des solutions. Cependant, ces types d'options, comme la médiation, ne conviendront certainement pas à certains couples en situation très conflictuelle, et le système doit alors prévoir des solutions de rechange. Le défi pour le Comité et pour les gouvernements est de concevoir un système qui puisse convenir à différents types de divorces, sans pénaliser les couples d'une catégorie avec des solutions destinées à une autre. Un grand nombre de témoins ont reconnu que les familles très conflictuelles mobilisaient une part disproportionnée des ressources juridiques et autres.

En revanche, les familles hautement conflictuelles sont celles qui mobilisent le plus de temps au tribunal. Les causes hautement conflictuelles sont celles qui prennent le plus de temps aux juges et au personnel judiciaire. Aussi, il est important que les systèmes mis au point visent avant tout à répondre aux besoins de ces familles. (Thomas Darnton, professeur invité, clinique juridique de défense des enfants, University of Michigan Law School, réunion 26)

Les conclusions et les recommandations du Comité démontrent le désir des membres d'améliorer la façon dont le système judiciaire répond aux divorces très conflictuels, sans imposer de restrictions indues à la

majorité qui coopère. Selon les membres, l'une des options à considérer serait d'établir un mécanisme permettant d'identifier les divorces très conflictuels afin de les traiter dans un circuit différent. On reconnaîtrait ainsi les torts qui risquent d'être causés aux enfants dont les parents maintiennent les rapports d'opposition longtemps après une période d'adaptation raisonnable. Il faut que le système identifie ces familles pour que l'on puisse assurer la protection de leurs enfants, qui courent plus de risque que la plupart des enfants des couples qui divorcent. Une fois les familles identifiées, il faudrait étiqueter leur dossier d'une manière ou d'une autre pour que les intervenants ne prennent pas de décisions sur les arrangements parentaux sans connaître tous les détails du cas et les antécédents familiaux.

Barbara Chisholm, de l'Association des travailleuses et travailleurs sociaux de l'Ontario, a recommandé que des « maîtres spéciaux » soient chargés des cas de mésentente grave.

Ces « maîtres spéciaux » devraient recevoir une formation particulière sur les méthodes non judiciaires de règlement des conflits et être prêts à assurer un suivi à long terme. Il faut restreindre le nombre d'ajournements autorisés dans les causes portant sur les modalités de garde et de visite, de même que le nombre de retours possibles devant les tribunaux. Une fois la limite atteinte, la cause devrait être renvoyée d'office devant un des maîtres spéciaux [...] C'est un programme qui a été lancé aux États-Unis et en Australie et qui consiste à nommer un juge - un juge qualifié et expérimenté - à un poste spécial. Il s'agirait d'un nouveau type de nomination à la magistrature pour quelqu'un qui recevrait une formation spéciale et qui serait là expressément pour s'occuper des cas particulièrement difficiles, quand les gens reviennent sans cesse devant les tribunaux, qu'ils congédient leur avocat parce qu'ils n'aiment pas ses avis et qu'ils en prennent un autre pour le congédier lui aussi par la suite. (Réunion 13, Toronto)

Le Comité a recommandé de créer ce rôle juridictionnel spécialisé, dans le cadre des services offerts par les tribunaux unifiés de la famille (voir recommandation 24).

Le Comité estime que l'identification et la canalisation des familles en situation hautement conflictuelle seraient avantageux pour ces familles et pour les autres parties au litige. Ces familles ont besoin de services spécialisés et elles utilisent davantage de ressources judiciaires, ce qui risque de causer des retards qui se répercuteront peut-être sur les autres familles. Étant donné le nombre significatif de mariages se terminant par un divorce et la tendance à la baisse de l'âge des enfants au moment du divorce de leurs parents, pareilles perturbations de la vie de famille marqueront probablement davantage les enfants, surtout dans les cas hautement conflictuels. Le fait que les enfants touchés soient plus jeunes influe sur tous les services thérapeutiques et autres services offerts aux familles en instance de divorce, y compris ceux que dispense la protection de l'enfance.

Symptôme particulièrement alarmant d'un divorce fortement conflictuel, un enfant peut décider de ne plus voir l'un de ses parents. Les membres ont été profondément troublés par de tels cas exposés par des témoins, notamment lorsque des enfants ont manifesté au Comité leur désir de couper les liens avec un parent qui n'habite pas avec lui. De l'avis des membres, un tel désir chez un enfant révèle un grave problème et nécessite une intervention immédiate. Un enfant qui met son voeu à exécution, avec l'aide de l'autre parent ou du système judiciaire, peut à longue échéance en venir à le regretter.

Recommandations

32. Le Comité recommande que les gouvernements fédéral, provinciaux et territoriaux unissent leurs efforts pour favoriser l'établissement de modèles efficaces permettant de dépister rapidement les séparations très conflictuelles. Les familles en cause devraient recevoir rapidement une aide spécialisée et avoir accès à des services destinés à améliorer le sort des enfants.

33. Le Comité recommande que les professionnels qui rencontrent des enfants dont les parents se séparent soient conscients que le refus d'un enfant d'avoir des contacts avec l'un de ses parents peut être le signe d'un problème grave et justifie l'acheminement immédiat de la famille vers une intervention thérapeutique.

Beaucoup de témoins ont fait un lien entre le niveau de conflit existant entre les parents en instance de divorce et la probabilité que ces parents nécessitent soit une supervision durant les périodes passées avec leurs enfants, soit l'intervention de la protection de l'enfance. Le Comité a examiné les données sur les programmes de supervision du rôle des parents, ou de visites supervisées comme on dit maintenant, en vigueur dans quelques administrations canadiennes. Les membres se sont aussi intéressés à l'interaction entre, d'une part, les procédures de divorce impliquant des enfants et, d'autre part, les services provinciaux de protection de l'enfance.

A. Programmes d'exercice supervisé des responsabilités parentales

Lorsqu'on a des raisons de croire qu'il est dans l'intérêt de l'enfant de passer du temps avec le parent qui ne vit pas avec lui mais que l'on craint pour la sécurité de l'enfant ou que l'on a des préoccupations d'un autre ordre, la solution consiste souvent à recourir à des visites supervisées ou à ce que le Comité préfère appeler l'« exercice supervisé des responsabilités parentales ». Certains témoins ont dit qu'il peut être embarrassant pour l'enfant et le parent que ces visites supervisées se déroulent dans un centre communautaire ou dans un autre type de lieu public en présence d'autres familles ou de superviseurs. Le Comité est pour sa part convaincu que cette formule est quand même meilleure qu'une absence totale de contact entre l'enfant et le parent et que les programmes de visites supervisées sont un élément essentiel des mécanismes entourant le divorce. Les relations parent-enfant ne devraient pas souffrir du simple fait que nous n'avons pas les moyens d'offrir des visites supervisées. Sally Bleecker, coordonnatrice d'un programme de visites supervisées à Ottawa, a fait valoir l'importance de ces visites pour permettre aux parents et aux enfants concernés de garder le contact, possibilité qui n'existerait simplement pas en l'absence de ce service.

Partout au monde, les enfants ont des relations avec des parents qui sont moins que parfaits. Les enfants sont très attachés, nous le savons, à leurs parents et espèrent qu'ils vont s'améliorer. Ils vivent souvent dans l'espoir, comme nous tous, quelles que soient les relations dans lesquelles nous sommes, et je crois vraiment que ces enfants profitent du soutien que nous pouvons leur offrir pour voir si ces relations pourront s'améliorer. (Réunion 24)

Le programme de visites supervisées de l'Ontario a été décrit par sa coordonnatrice, Judy Newman :

Les centres de visite supervisée, tels que prévus par le ministère du Procureur général, offrent un cadre sûr, neutre et axé sur les enfants pour les visites et les échanges d'enfants avec les membres de la famille qui n'en ont pas la garde comme des grands-parents ou des parents. La visite supervisée assure le respect des ordonnances du tribunal en offrant un endroit où peuvent se tenir ces visites et ces échanges et fournit, sur demande, des notes d'observation factuelle ou des rapports aux avocats et au tribunal afin de les aider à émettre des ordonnances concernant le droit de garde et de visite. Les centres de visite supervisée ne sont pas un cadre d'évaluation et ne font pas de recommandations quant au droit de garde et de visite. Ils fournissent simplement des observations factuelles et le cadre voulu pour des visites et des échanges. Le ministère finance actuellement 15 centres en Ontario grâce à des paiements de transfert. En 1997 et 1998, ceux-ci ont servi 9 000 familles pour 24 000 visites et échanges. (Réunion 24)

Deux aspects de la question ont été fréquemment soulevés par les témoins, d'une part le profil de cas nécessitant une supervision des visites et d'autre part l'insuffisance de programmes de visites supervisées dans certaines régions du pays. Des témoins ont expliqué la manière dont doivent se dérouler ces visites et le

transfert de l'enfant d'un parent à l'autre dans les cas de violence familiale ou dans d'autres cas où la sécurité de l'enfant ou du parent qui en a la garde est à risque.

Il faudrait que la visite supervisée, notamment la supervision du transfert de l'enfant d'un parent à l'autre, et le recours à un lieu neutre de visite soient obligatoires dans les cas où il y a eu violence à l'égard du parent qui a la garde de la part du parent qui a le droit de visite [...] Le coût de la supervision et de l'utilisation d'un lieu de visite convenable répondant aux besoins de l'enfant doit être assumé par le parent qui a usé de violence à l'égard de l'autre parent. Ces dispositions concernant la supervision ont également l'avantage d'empêcher que le conjoint qui a été la victime de violence fasse à nouveau l'objet de menaces, d'intimidation ou de mauvais traitements. (Elaine Teofilovici, YWCA, réunion 8)

Claire McNeil, de Dalhousie Legal Aid, a dit au Comité que les juges ordonnaient fort à propos des visites supervisées, mais que, faute de fonds, de tels programmes ne sont pas disponibles à Halifax. Dans certains cas, les visites peuvent être supervisées par un membre de la famille ou par un ami agréé par les parties, mais même cette formule a ses limites en présence de violence, de toxicomanie ou d'alcoolisme ou de problèmes de sécurité. Même en Ontario, où il existe des programmes de visites supervisées dans la plupart des grands centres, les témoins ont signalé le manque de ressources, l'insuffisance des services et le besoin d'élargir le programme.

Recommandations

- 34. Le Comité recommande que les autorités fédérales, provinciales et territoriales collaborent pour faire en sorte qu'il y ait des programmes d'exercice supervisé des responsabilités parentales partout au Canada.
- 35. Le Comité recommande de modifier la *Loi sur le divorce* pour y ajouter une disposition explicite autorisant le tribunal à rendre une ordonnance d'exercice supervisé des responsabilités parentales si nécessaire, afin de permettre à un parent de continuer à voir son enfant dans des situations de transition ou lorsque les circonstances indiquent clairement que l'enfant a besoin de protection.

B. Interaction avec les services de protection de l'enfance

Les audiences du Comité ont fait ressortir les interactions complexes qui peuvent exister entre les parents en conflit au sujet de la garde et du droit de visite des enfants et les services de protection de l'enfance. Les lois provinciales et territoriales en matière de protection de l'enfance déterminent dans quels cas l'État se doit d'intervenir pour protéger le bien-être des enfants. Dans chaque cas, les lois en question précisent dans quelles situations un enfant est censé avoir besoin de protection et les conditions qui justifient l'intervention d'un organisme public de protection de l'enfance ou d'une société d'aide à l'enfance. Dans toutes ces lois, c'est l'intérêt de l'enfant qui préside aux décisions. Selon les témoins entendus par le Comité, le nombre écrasant de cas confiés aux travailleurs sociaux à cause de l'insuffisance des ressources est une caractéristique universelle des services de protection de l'enfance. La protection des enfants devrait manifestement recevoir plus d'attention et de ressources de la part des gouvernements.

Lorsque le Comité a examiné la question de l'interaction entre les services de protection de l'enfance et les parents en conflit, une des questions soulevées portait sur la façon dont sont menées les enquêtes lancées à la suite d'allégations de mauvais traitements portées par une des parties à un conflit au sujet de la garde ou du

droit de visite d'un enfant. Le plus souvent, ces allégations sont signalées aux services de protection de l'enfance, dont les enquêtes ont généralement des répercussions immédiates sur les modalités de garde et de visite des enfants. Aux dires de certains témoins, il arrive qu'un parent formule de fausses accusations à l'endroit de l'autre à la seule fin d'obtenir un avantage injuste sur lui en matière de garde et d'accès. Dans de tels cas, il est essentiel de maintenir la relation parent-enfant grâce à des modalités de supervision de l'exercice des responsabilités parentales. Des témoins, dont beaucoup parlaient d'expérience, ont décrit en détail les répercussions catastrophiques qu'ont, sur les parents innocents, de telles accusations non fondées et malveillantes. La question des abus sexuels à l'égard des enfants est extrêmement complexe et nous abordons le problème des fausses accusations plus loin dans le présent chapitre (voir aussi recommandation 35).

Lorsqu'une famille est aux prises avec un différend au sujet de la garde et du droit de visite des enfants et qu'elle est en même temps l'objet d'une enquête ou d'une intervention de la société d'aide à l'enfance, les interactions entre les deux systèmes posent des difficultés parfois au point où ils se nuisent l'un l'autre. Vu le grand nombre de séparations et de divorces, il est inévitable qu'une proportion importante des cas signalés aux autorités de protection de l'enfance concernent des enfants dont les parents sont séparés, qu'il y ait ou non accord au sujet des responsabilités parentales.

Il importe que les difficultés présentées par ces cas ne masquent pas la présence de facteurs de risque qui justifieraient une intervention pour la protection de l'enfant. Le Comité espère qu'il sera possible d'instituer des mécanismes garantissant que les enfants ne soient pas négligés, qu'ils n'échappent pas à l'attention des autorités en matière de protection de l'enfance et qu'ils ne soient pas privés d'une intervention utile parce qu'ils font l'objet d'un conflit en matière de garde ou de droit de visite. La multiplication éventuelle des tribunaux unifiés de la famille ou de tribunaux analogues dans l'ensemble du Canada pourrait contribuer à résoudre ce problème dans la mesure où un même tribunal pourrait s'occuper des familles qui ont à la fois des problèmes de garde et d'accès et des problèmes de protection de l'enfance.

Il arrive que la résolution des conflits en matière de garde et de droit de visite révèle des situations préoccupantes qui déclenchent une enquête de la part des services de protection de l'enfance. Cette enquête a parfois lieu en même temps ou avant l'évaluation effectuée par un psychologue ou un travailleur social pour déterminer les modalités de la garde et du droit de visite. Comme la psychologue Rosalyn Golfman l'a dit au Comité, les résultats de l'enquête des services de protection de l'enfance ne sont pas toujours communiqués à la personne chargée d'évaluer la situation.

Parfois, on nous communique les entretiens avec l'enfant et parfois on nous les refuse, et nous ne savons pas pour quelle raison. Souvent, nous devons demander une assignation judiciaire, une procédure longue et coûteuse. Nous aimerions donc également des changements à cet égard. Si nous effectuons une évaluation exhaustive, nous avons besoin de savoir ce que l'enfant a réellement dit. (Réunion 22, Winnipeg)

Il peut aussi arriver que des parents qui s'engagent dans des procédures très longues relativement à la garde ou au droit de visite des enfants placent leurs propres enfants dans une situation qui leur fait courir des risques au point où une intervention s'avère nécessaire. Entre autres témoins qui ont recommandé la modification des lois provinciales de protection de l'enfance, Heidi Polowin, conseiller juridique de la Société d'aide à l'enfance d'Ottawa-Carleton, recommande d'élargir la définition des enfants ayant besoin d'être protégés pour l'étendre aux enfants dont les parents sont engagés dans de longs conflits en matière de garde. Cette recommandation est issue de l'enquête du coroner dans l'affaire Kasonde, relativement au décès de deux enfants d'Ottawa tués par leur père dans le contexte d'un conflit acrimonieux opposant les parents au

sujet de la garde et du droit de visite des enfants⁷⁵.

Le jury n'a pas retenu cette recommandation, mais il a recommandé que l'Ontario institue un système qui ferait le pont entre les lois en matière de bien-être de l'enfant et les lois en matière de garde et de droit de visite des enfants afin de préciser le rôle des services de protection de l'enfance dans des situations analogues à celle de la famille Kasonde. Le jury a aussi recommandé d'étendre les motifs à invoquer pour déclarer qu'un enfant a besoin de protection afin d'inclure les cas où l'enfant est exposé à des mauvais traitements de la part de ses parents, à de la violence familiale, à des toxicomanies ou à l'alcoolisme, à de la violence psychologique ou à une négligence qui risque de lui causer des torts psychologiques ou physiques et de retarder son développement.

Recommandation

36. Le Comité recommande que les autorités provinciales et territoriales obligent les sociétés d'aide à l'enfance à communiquer leurs dossiers d'enquête aux personnes chargées par le tribunal d'évaluer les familles qui sont soumises à de telles enquêtes.

C. Recherche

Tout au long de son étude, le Comité a maintes fois été confronté au problème d'un manque de recherche sur divers aspects du divorce, ses conséquences pour les enfants et autres questions connexes. Les membres du Comité qui, en mai 1998, ont assisté à Washington (D.C.) à la Conférence de l'Association of Family and Conciliation Courts ont été impressionnés par le fait que, dans bien des entités administratives américaines, on effectue des recherches sur ces questions vitales et les résultats en sont facilement accessibles pour guider les décideurs, les législateurs et les parents. Aux yeux de plusieurs d'entre nous, voilà un frappant contraste avec la situation au Canada.

Le Comité a cerné des domaines précis qu'il faudra, dans un proche avenir, approfondir davantage au Canada. Ce sont :

- les fausses allégations de mauvais traitements;
- l'aliénation parentale;
- les comportements, les modes et la dynamique de la violence familiale;
- les enlèvements d'enfants par l'un des parents.

Les membres du Comité ont été impressionnés par l'envergure et le potentiel de l'Étude longitudinale nationale sur les enfants et les jeunes, mais estiment que ses données devraient avoir une portée élargie et qu'elle devrait servir à approfondir d'autres questions liées à l'incidence de la séparation et du divorce sur les enfants, par exemple :

• l'impact d'un contact maintenu avec les grands-parents;

Verdict of Coroner's Jury, Inquest into the Deaths of Margret and Wilson Kasonde, Ottawa, 22 avril — 24 juin 1997, Dr Bechard, coroner pour l'Ontario (inédit).

- l'impact de la perte de contact avec l'un des parents;
- le bien-être des enfants cinq ou dix ans après l'adoption d'arrangements parentaux, soit par consentement soit par ordonnance;
- l'impact sur le bien-être des enfants d'une entente à l'amiable entre les parents.

D. Violence familiale

La violence familiale est un des facteurs aggravants les plus dangereux dans les cas de séparation ou de divorce. Ce sujet a d'ailleurs été l'un des plus controversés à être présentés aux audiences du Comité, sujet que les membres trouvent très troublant. Les témoins ne s'entendaient pas sur l'incidence et la nature de ce type de violence, notamment si ce sont les hommes qui en sont le plus souvent les auteurs et les femmes le plus souvent les victimes. Ils différaient également d'avis sur l'incidence des actes de violence familiale commis par des femmes, sur la gravité de ces actes et sur leur pertinence dans les décisions en matière d'arrangements parentaux. Plusieurs aspects sont toutefois incontestables. Les enfants qui assistent à des scènes de violence entre leurs parents en gardent des séquelles. Lorsqu'il y a de la violence entre les parents, les possibilités que cette violence ne s'aggrave au moment de la séparation sont élevées, et cela pose des risques réels pour la sécurité du conjoint et des enfants. Il est clair qu'il faut tenir compte de la présence de violence ou des risques de violence dans les décisions sur les arrangements parentaux. C'est un problème qui touche une minorité de couples qui divorcent et des couples non mariés qui se séparent.

Le professeur Donald Dutton, psychologue de recherche, est venu témoigner devant le Comité à Vancouver. Il a, pendant au moins une dizaine d'années, étudié la violence dans les relations intimes. Comme il l'a rappelé au Comité, la recherche révèle que la majorité des hommes — 75 p. 100 — ne sont jamais violents dans leurs relations intimes. Certaines de ses conclusions concernent des gens non visés par la *Loi sur le divorce* (comme les conjoints de fait), mais il a présenté les constatations suivantes au sujet de la violence liée aux disputes parentales :

Pour ce qui est du lien avec les questions de garde et de divorce, j'ai de temps à autre été appelé comme expert dans des procédures de garde ou de divorce, lorsqu'il y avait allégation de violence. À mon avis, ces cas doivent vraiment être étudiés chacun séparément.

Si l'on examine le produit de nos travaux de recherche, le modèle le mieux adapté est évidemment celui de la famille intacte, mais cela suppose deux parents non violents. Si vous n'avez pas cette base, si l'un des parents est violent, alors il me semble que l'enfant devrait habiter avec le parent non violent. Il convient alors de déterminer si la violence du parent sera dirigée vers l'enfant ou se limitera à la relation avec le conjoint. Les études semblent indiquer que les deux peuvent se produire. Pour cette raison, à nouveau, je pense qu'il faut examiner chaque cas isolément dans de telles affaires. On ne peut pas régler ces situations en termes de différence entre les sexes, etc., cela ne donne pas de bons résultats. (Réunion 27, Vancouver)

De nombreuses controverses entourent la violence familiale. On ne s'entend pas sur la définition de ce type de violence, sa portée, l'utilité des statistiques des corps policiers sur les voies de fait, les profils des agresseurs et des victimes, ainsi que la validité des outils utilisés pour mesurer la violence. Même si l'attention porte souvent sur la violence entre les adultes d'une famille, on s'inquiète également des mauvais traitements infligés aux enfants et aux personnes âgées. Les mesures législatives sur la garde et le droit de visite ont toujours reconnu la pertinence, pour les décisions en la matière, de la violence ou des autres formes de mauvais traitements infligés aux enfants. Pendant longtemps, toutefois, on a pensé que la violence entre les parents, par exemple le fait qu'un conjoint inflige des sévices corporels à l'autre conjoint, n'influait pas directement sur les compétences parentales du conjoint violent et l'on n'en voyait donc pas la pertinence pour

les décisions concernant la garde et le droit de visite. Étant donné les recherches relativement récentes en santé mentale qui établissent un lien clair entre la violence conjugale et le bien-être des enfants, les tribunaux ont commencé à reconnaître le poids à donner à un tel comportement dans la prise de décisions concernant les responsabilités parentales.

Le Comité a entendu des messages contradictoires de la part de divers témoins dont des universitaires, des professionnels en santé mentale, ainsi que des défenseurs des hommes et des femmes. Bon nombre ont déclaré que la violence familiale est un problème propre à un sexe, la plupart des agresseurs étant des hommes et la plupart des victimes, des femmes. Cet argument est soutenu par les données sur la violence fournies par Statistique Canada, notamment dans son enquête controversée sur la violence envers les femmes au Canada, effectuée en 1993; les statistiques venant des corps policiers et celles des tribunaux de la famille de Winnipeg et de l'Ontario; et les données administratives venant de refuges pour femmes victimes de mauvais traitements de la part de leur conjoint. Par contre, un certain nombre de témoins qui se fondaient sur de récentes enquêtes auprès de la population générale, notamment sur les travaux du sociologue américain Murray Strauss et, au Canada, de la sociologue Reena Sommer, ont soutenu qu'il y a à peu près autant d'hommes que de femmes qui commettent des actes de violence dans un couple⁷⁶.

Les témoignages reçues pas le Comité reflètent ces différents courants d'opinions. Par exemple, Jane Ursel, sociologue à la Cour de violence familiale de Winnipeg, a fourni des données provenant de ce tribunal :

Au cours des trois années sur lesquelles portent ces données, il y a eu 5 674 cas de violence conjugale. 92 p. 100 des contrevenants condamnés étaient des hommes et 89 p. 100 des victimes des femmes. [...] nous avons les sévices à enfant... 562 condamnations au cours de la même période; 89 p. 100 des accusés étaient des hommes et 76 p. 100 des victimes des femmes, le restant étant des enfants des deux sexes. Dans le cas des sévices aux personnes âgées, 91 p. 100 des accusés étaient des hommes et 81 p. 100 des victimes des femmes. (Réunion 22, Winnipeg)

Les plus récentes données de Statistique Canada, fondées sur les statistiques provenant des corps policiers, montrent que, en 1996, 11 p. 100 des victimes de violence familiale étaient des hommes, tandis que la vaste majorité (89 p. 100) étaient des femmes⁷⁷. Les hommes étaient également plus susceptibles que les femmes de tuer leur conjoint⁷⁸. Diverses situations permettent de prévoir la violence faite aux femmes comme le jeune âge du couple, la vie en union de fait, le chômage chronique de l'homme dans le couple, les personnes qui ont été témoins d'actes de violence pendant leur enfance, et la présence de violence psychologique dans le couple.

Certains témoins travaillant dans des refuges pour femmes ont souligné la prévalence des mauvais traitements infligés aux femmes et la nécessité d'assurer la protection des femmes victimes de violence et de leurs enfants, en particulier au moment de la séparation.

Dans les cas de violence faite aux femmes, le moment de la séparation est particulièrement dangereux. Selon ses habitudes de contrôle et de domination, l'agresseur dit à ses victimes depuis des années que si elles, leurs enfants ou leurs familles, osent partir, il les battra ou les tuera. La peur que ressentent ces femmes est très justifiée. (Bine Ostoff, conseillère, London Battered Women Advisory Centre, London Coordinating Committee to End Women Abuse, réunion 14, Toronto)

L'expression « population générale » est utilisée pour indiquer que les sujets de l'étude n'étaient pas impliqués dans le système de justice pénale. Les données de Mme Sommer proviennent d'entrevues réalisées auprès d'un échantillon aléatoire de 899 personnes, composé à parts à peu près égales d'hommes et de femmes.

Statistique Canada, La violence familiale au Canada: un profil statistique, (Ottawa: Centre canadien de la statistique juridique, 1998).

⁷⁸ Les meurtres de conjoints est un secteur statistique qui a peu de faire l'objet d'une sous-déclaration.

La plupart des témoins préconisant des moyens de réagir à la violence faite aux femmes ne disaient pas que les femmes étaient toujours les victimes de la violence familiale, ni que les hommes n'étaient jamais agressés par leur conjointe. Par exemple, Gary Austin, de la London Family Court Clinic, a reconnu qu'il était possible que des hommes soient victimes de violence familiale mais que le problème de la violence faite aux femmes était plus courant et plus grave, en raison de la forme de violence et parce que les femmes sont plus susceptibles de dépendre des hommes sur le plan financier.

Les recherches approfondies effectuées en Amérique du Nord indiquent que 90 p. 100 de la violence familiale est dirigée contre les femmes et les enfants. Nous [...] ne fermons pas les yeux sur la violence contre les hommes et nous reconnaissons qu'il y a un certain nombre de divorces dans le cas desquels des femmes ont fait subir de mauvais traitements psychologiques à des hommes. Cette forme de violence est peut-être sous-déclarée et devrait mener à des solutions comparables à celles décrites dans le document le cas échéant. Cependant, la violence faite aux femmes demeure un problème majeur dans les rapports conjugaux où un nombre accru de femmes sont menacées de mort et de blessures graves et où les hommes exercent leur contrôle et leur domination en leur infligeant de mauvais traitements. (Réunion 18)

L'information sur la violence faite aux femmes est disponible sous forme anecdotique, ainsi que dans les résultats des enquêtes auprès de la population générale effectuées à l'aide de la *Conflict Tactics Scale* (CTS), instrument de mesure conçu par Murray Strauss⁷⁹. Cette échelle a été utilisée par Statistique Canada en 1993 dans son enquête sur la violence faite aux femmes. Certains témoins ont cité des résultats dont le principal, soit que 29 p. 100 des femmes mariées actuellement ou qui l'avaient été avaient connu une certaine forme de violence conjugale. Certains membres ont fait remarquer que cette même enquête de 1993 avait révélé que la vaste majorité des femmes, soit 97 p. 100, n'avaient pas subi de violence l'année précédente. D'après l'étude, « Trois pour cent des femmes [...] ont été agressées par leur conjoint dans les douze mois précédant l'enquête »⁸⁰. On a toutefois reproché à l'Enquête sur la violence envers les femmes de n'avoir appliqué la CTS qu'aux femmes, sans interroger les hommes sur la violence dont ils avaient pu être victimes. Certains membres du Comité ont noté la préoccupation du D^r Murray Strauss face à la mauvaise utilisation de sa méthodologie du CTS lors de l'enquête de 1993 de Statistique Canada. Il a remarqué l'ommission des questions portant sur la violence faite aux hommes :

C'est ce qui a été fait dans l'Enquête sur la violence faite aux femmes. Statistique Canada a utilisé la méthodologie du CTS que j'ai développée. Mais ils ont mis de côté la moitié des questions qui visent la violence chez les femmes afin de ne pas avoir à faire face à des données qui auraient pu les embarasser politiquement.

La sociologue manitobaine Reena Sommer a parlé au Comité de sa recherche concentrée sur les auteurs de la violence conjugale dans la population générale. Elle a insisté sur le fait qu'il ne fallait pas confondre ni interchanger ses résultats avec les données de la Cour de violence familiale, pas plus qu'avec d'autres données policières. Ses travaux portent notamment sur des types d'abus qui ne figurent peut-être pas dans les statistiques de la police, comme les cas de violence psychologique.

La violence tend à ne pas être physique, mais lorsqu'elle l'est, elle tend aussi à être réciproque et pas suffisamment grave pour exiger une intervention médicale. C'est pourquoi la plupart des personnes qui répondent dans les enquêtes auprès de la population générale n'apparaissent pas dans les statistiques criminelles. Elles ne cherchent pas secours. (Réunion 22)

Juristat, Statistique Canada, Résultats d'une enquête nationale sur l'agression contre la conjointe, vol. 14, nº 9 (mars 1994), p. 4.

Murray Strauss, « Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scale », Journal of Marriage and the Family 41 (1979), p. 75-88. Voir aussi Murray Strauss et Richard Gelles, Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families (New Brunswick, N.J.: Transaction, 1990).

Mme Sommer, qui inclut dans ses recherches cet éventail élargi de comportements violents allant au-delà des types d'abus auxquels on a habituellement affaire dans les cours criminelles ou les refuges pour femmes, en est arrivée à la conclusion suivante :

Les résultats de mes recherches montrent qu'il n'y a pas de différence notable entre les taux d'abus perpétrés par les hommes et les femmes. Ils sont essentiellement équivalents. Cela ne revient pas à dire qu'un sexe souffre plus ou souffre moins que l'autre. Je dis simplement qu'il y a autant d'hommes que de femmes qui se livrent à des abus sur leur partenaire. (Réunion 22)

Jane Ursel a expliqué en ces termes les différences entre les données de la Cour de la violence familiale et celles de Reena Sommer :

Je pense que là où réside peut-être la différence est que Mme Sommer traite des conflits dans une relation. Des études ont été faites - je pense qu'il en a été longuement question à cette table dans une autre ville, telle que l'étude canadienne sur la violence faite aux femmes, en 1993 — qui ont tenté de mesurer les degrés de violence. Je conviens tout à fait que dans beaucoup de couples, les deux membres, peuvent avoir de la difficulté à résoudre les conflits et peuvent choisir des stratégies qui ne sont pas optimales. Mais je pense que, lorsqu'il s'agit de mesurer le degré effectif d'agression physique, il y a une différence dans le cas des agressions d'hommes sur les femmes. La gravité des blessures est typiquement plus grande lorsque un homme agresse une femme. (Réunion 22)

Cette distinction entre les conflits dans une relation et la violence conjugale d'une nature criminelle est probablement ce qui permet de comprendre les différents modèles qui se dégagent des données citées. D'autres recherches empiriques permettraient de mieux comprendre le problème de la violence dans une relation, mais les membres veulent quand même insister sur un point : lorsque la violence, dans un foyer, constitue une menace pour les enfants, des mesures doivent être prises peu importe le parent agresseur.

Les hommes sont également victimes de violence. Le Comité a entendu les témoignages de plusieurs hommes qui disaient avoir été maltraités par leur conjointe. Lyn Barrett, de la Cumberland County Transition House Association, a dit que la maison de transition offrait des programmes aussi bien pour les hommes que pour les femmes. Elle a ajouté que, durant la dernière année, l'organisme avait répondu aux demandes d'aide de 110 femmes et de seulement cinq hommes, dont deux avaient un conjoint de même sexe. Elle a donné l'explication suivante :

La gravité de la violence dont sont victimes les hommes que nous accueillons est loin d'atteindre celle de la violence que subissent les femmes, et les chiffres sont loin d'être les mêmes. Cela ne veut pas dire qu'il n'y a pas des hommes qui sont victimes de violence et qui ne demandent pas d'aide à cause de la honte qu'ils ressentent ou de je ne sais trop quoi, mais nous savons tous que dans le cas des femmes que nous accueillons, il ne s'agit que de la pointe de l'iceberg. Pendant très longtemps, les femmes ne pouvaient pas obtenir d'aide, et c'est ce que nous sommes toutes là à faire reconnaître et confirmer. (Réunion 30, Halifax)

Étant donné que les hommes sont également victimes de violence, le Comité ne recommanderait pas l'emploi, en droit de la famille ou dans les lois sur le divorce, d'une définition de la violence familiale qui soit propre à un sexe.

Après avoir entendu et examiné attentivement tous les faits présentés au sujet de la violence familiale, le Comité reconnaît le besoin impérieux de poursuivre les recherches sur la violence familiale, ses incidences, ses causes, les mesures de prévention possibles, ainsi que les moyens d'en réduire les répercussions néfastes et de protéger les membres de la famille. Certains membres ont fait valoir que le Comité avait eu trop peu de témoignages sur l'incidence et le rôle de la violence familiale dans les procédures de séparation et de divorce.

Aux fins de cette étude, cependant, il faut avant tout se pencher sur les répercussions de la violence chez les enfants témoins d'actes de violence. Les données à ce sujet sont moins équivoques, et le Comité exhorte tous les gouvernements à les examiner attentivement et à faire en sorte que les mesures législatives obligent les professionnels en droit et en santé mentale intervenant dans l'élaboration des ententes parentales à faire de même si les circonstances le réclament.

Faisant un rapport sur les travaux de Peter Jaffe et d'autres intervenants de la London Family Court Clinic, le psychologue Gary Austin a dit au Comité que la grande majorité des enfants vivant dans des foyers où il y a de la violence sont conscients de cette violence et en subissent les effets négatifs. Il existe un lien entre les mauvais traitements infligés aux conjoints et ceux infligés aux enfants, car les enfants qui vivent avec un parent violent sont plus susceptibles que les autres d'être eux-mêmes la cible de mauvais traitements et, même s'ils ne sont pas directement la cible de mauvais traitements, le fait qu'ils aient été témoins d'actes de violence envers l'un de leurs parents leur est aussi nuisible que s'ils en avaient été les victimes directes⁸¹.

L'une des découvertes les plus importantes ces dernières années dans le domaine de la violence familiale tient à ce qu'on reconnaît maintenant que les enfants ayant été témoins de violence familiale en portent différentes séquelles. En réalité, le fait d'avoir été témoin de violence est une forme de violence psychologique qui peut entraîner les mêmes problèmes d'adaptation que les mauvais traitements ou la violence sexuelle. (Réunion 18)

Puisqu'il est établi que la violence familiale a des répercussions négatives sur les enfants qui en sont témoins, plusieurs témoins, dont le Dr Austin, ont recommandé l'adoption de mesures législatives. La plupart de ces témoins ont préconisé une modification de la *Loi sur le divorce* et l'adoption de lois provinciales en droit de la famille qui tiennent compte de la violence familiale dans les décisions relatives à la garde et au droit de visite, et souhaitaient que ce soit là un point à considérer par le juge. De plus, il devrait y avoir une présomption à l'effet que les parents ayant maltraité leur conjoint n'ont pas droit à la garde exclusive, à la garde partagée ni à un droit de visite généreux ou sans supervision. À cet égard, Gary Austin a cité le code modèle conçu en 1994 par le U.S. National Council of Juvenile and Family Courts Judges :

Dans toutes les actions où il s'agit d'un conflit sur la garde des enfants, la décision par la Cour qui conclut à une violence familiale soulève une présomption réfutable selon laquelle il est nuisible à l'enfant, et à ses intérêts, d'être placé sous la garde exclusive, la garde conjointe ou la garde physique conjointe de l'auteur de la violence familiale. (Réunion 18)

Comme le D^r Austin l'a souligné, « il n'est nullement question du sexe de l'agresseur ».

E. Enlèvement d'enfants par le père ou la mère

L'enlèvement d'enfants par le père ou la mère est éprouvant à la fois pour l'enfant et l'autre parent. Lorsqu'il n'y a pas retour de l'enfant, l'impact peut être dévastateur.

En 1988, le gouvernement fédéral a établi, à la GRC, le Bureau d'enregistrement des enfants disparus. Comme le soulignait le sergent John Oliver, ce Bureau est un « programme d'application de la loi reconnu à l'échelle internationale qui se consacre exclusivement à la recherche des enfants disparus » (Réunion 24). Le Bureau traite chaque mois une soixantaine de nouveaux cas, une partie étant de présumés enlèvements par l'un des parents. Le sergent Oliver a souligné les risques que couraient les enfants enlevés, rappelant au Comité que même les enfants qui sont avec le père ou la mère peuvent être en danger. Il a parlé d'un outil

Peter Jaffe et coll., Children of Battered Women (Newbury Park: Sage Publications, 1990).

essentiel dans les enlèvements d'enfants au pays et à l'étranger, soit un registre national des ordonnances de garde et de droit de visite, et c'est l'une des raisons pour lesquelles le Comité a recommandé l'instauration d'un registre des ordonnances de partage des responsabilités parentales (voir recommandation 20).

Les articles 282 et 283 du *Code criminel* permettent de poursuivre les parents qui enlèvent leurs enfants au Canada, en contravention d'une ordonnance de garde. Cependant, il n'existe pas de disposition semblable pour les ordonnances de droit de visite. Aux fins du respect des ordonnances de garde ou de droit de visite, les parents doivent s'en remettre aux lois provinciales sur l'exécution réciproque des ordonnances, processus qui peut être lourd et coûteux, et peu commode pour les parents vivant loin de la province où le conjoint ravisseur s'est enfui avec l'enfant. Alex Weir, de Child Find Alberta, a dit au Comité qu'il est plus difficile de ramener un enfant enlevé au Canada que de garantir le retour d'un enfant emmené à l'extérieur du Canada dans un pays signataire de la Convention de La Haye, et il a recommandé que les provinces adoptent des dispositions semblables à celles de la Convention de La Haye pour hâter le retour des enfants enlevés. Il faut davantage se pencher sur ce qui constitute un enlèvement d'enfant par l'un des parents à l'intérieur du Canada ainsi que sur les mesures à prendre en pareille occurrence. Étant donné la transition recommandée à un régime de partage des responsabilités parentales, la distinction entre garde et accès devrait s'atténuer, et les articles 282 et 283 du *Code criminel* devront peut-être être modifiés en conséquence.

Gar Pardy a fait une suggestion pratique pour faciliter le retour des enfants enlevés d'une province à une autre.

Lorsqu'il y a mandat, il faudrait que la police qui l'émet lui donne une portée nationale. Bien souvent, lorsqu'un mandat d'arrêt est émis, sa portée est limitée sur le plan géographique et c'est parfois très frustrant parce que lorsque vous voulez vous servir du mandat, vous constatez qu'il n'est pas nécessairement valide dans une autre juridiction car les autorités locales, lorsqu'elles en prennent connaissance, vous rétorquent que le mandat n'est valide par exemple que pour la ville de Mississauga, de sorte que ce mandat n'a pas beaucoup de poids. (Réunion 24)

Le problème apparenté à celui de l'enlèvement, le retrait unilatéral, par l'un des parents, d'un enfant de la maison familiale n'est pas considéré comme un enlèvement d'enfant au sens criminel du terme lorsque le parent lésé ne bénéficiait pas d'une ordonnance de garde. Dans la plupart des provinces, les actuelles dispositions en droit de la famille établissant que le geste enfreint le droit législatif des parents avant la séparation, au droit de garde partagée de leurs enfants. Malgré tout, les décisions unilatérales de cette nature n'ont généralement pas donné lieu à des réparations au profit du parent lésé, sauf lorsque celui-ci s'est très rapidement adressé aux tribunaux pour obtenir le retour de l'enfant. Dans certains cas, le parent en fuite a réussi à invoquer la période de garde unique et entière qui s'en est suivie pour obtenir une ordonnance de garde exclusive. Le Comité estime que cette pratique, avec tous les avantages qu'elle peut procurer devant les tribunaux, devrait être sévèrement réprimée.

Le problème des enlèvements internationaux d'enfants a été examiné récemment par le Sous-comité des droits de la personne et du développement international du Comité permanent des affaires étrangères et du commerce international de la Chambre des communes. Dans son rapport intitulé *L'enlèvement international d'enfants : solutions de rechange*, ce dernier comité répond à bon nombre des questions soulevées par les témoins qui ont comparu devant nous. En novembre 1998 paraissait la *Réponse du gouvernement au quatrième rapport du Comité permanent des affaires étrangères et du commerce international*. Toutes les recommandations du Sous-comité ont été acceptées sauf trois. Le document du gouvernement fournit au Sous-comité une réponse détaillée au regard des recommandations, ce qui nous a été très utile. Toutefois, nous n'avons pas limité notre enquête aux enlèvements internationaux d'enfants.

Les enlèvements internationaux d'enfants sont surtout traités dans la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants (la «Convention de La Haye »). Cette convention

énonce les procédures à suivre pour garantir le retour d'un enfant déplacé d'un pays signataire de la Convention de La Haye vers un autre pays. L'ordonnance de garde et d'accès rendue par le tribunal initial doit être respectée. Gar Pardy, le représentant du ministère des Affaires étrangères et du Commerce international du Canada qui est chargé d'aider les familles dont les enfants ont été enlevés et sortis du Canada, a indiqué au Comité que l'échec du mariage et les liens étroits avec la famille qui vit dans un autre pays sont deux des points caractérisant les cas sur lesquels il travaille. Il a expliqué le fonctionnement de la Convention de La Haye et a recommandé que le Canada entame des négociations en vue de revoir la Convention pour inciter d'autres pays à la signer. À l'heure actuelle, il est presque impossible de résoudre les enlèvements à destination de pays non signataires de la Convention de La Haye même si les représentants parviennent souvent à obtenir la coopération de l'autre pays pour savoir où se trouve l'enfant et comment il se porte.

Service social international Canada peut venir en aide aux enfants victimes d'enlèvement et à leur famille, même lorsque l'enfant est emmené dans un pays non signataire de la Convention de La Haye. Grâce à un important réseau international, les travailleurs sociaux de cet organisme cherchent à faciliter l'évaluation du bien-être de l'enfant dans l'endroit où il a été emmené ou la médiation entre les parents. Cet organisme est présent dans environ 120 pays. Ils fournissent également une aide dans les affaires de garde et de droit de visite à l'extérieur du pays.

Le Sous-comité des droits de la personne et du développement international a formulé un certain nombre de recommandations sur les passeports et documents de voyage. L'une d'elles veut que les agents du Bureau des passeports examinent les actuelles mesures de traitement des demandes de passeport pour enfants ainsi que les moyens de renforcer ces procédures. Dans sa réponse, le gouvernement précise que les parents peuvent actuellement soit faire délivrer un passeport distinct au nom de l'enfant, soit faire inscrire le nom de l'enfant dans le passeport de l'un des parents. Dans les cas de séparation, seul le parent ayant la garde peut demander un passeport pour un enfant, et le consentement des deux parents est toujours exigé. Le gouvernement n'envisage pas en ce moment d'obliger tous les demandeurs à obtenir des passeports individuels pour leurs enfants; en fait, cela pourrait faciliter l'enlèvement d'un enfant si le parent ravisseur réussissait à mettre la main sur le passeport.

Le Canada a fait savoir à l'Organisation de l'aviation civile internationale (OACI) qu'il étudie des moyens technologiques qui permettraient d'imprimer dans le passeport des parents les renseignements relatifs à l'identité de l'enfant et sa photo. Ce genre de mesure garantirait l'identification exacte des enfants emmenés dans des voyages transfrontaliers pour lesquels un passeport est requis. Les photographies de passeport, si elles finissent par être imposées, devraient être renouvelées plus souvent que dans le cas des adultes (aux cinq ans), l'apparence physique des enfants subissant de plus rapides transformations. Le Comité est d'avis qu'il faudrait poursuivre les efforts susceptibles d'améliorer l'identification des enfants dans les passeports et aussi examiner plus avant la possibilité d'exiger un passeport individuel pour tous les enfants.

Recommandations

- 37. Le Comité recommande que les procureurs généraux du Canada et des provinces travaillent de concert avec les forces policières et les organismes policiers pour que tous les mandats délivrés dans les affaires d'enlèvement d'enfants stipulent clairement que leur portée et leur application sont nationales.
- 38. Le Comité recommande que le procureur général du Canada travaille à élaborer une réponse nationale concertée au problème de l'enlèvement d'enfants au Canada.
- 39. Le Comité recommande que le retrait unilatéral d'un enfant du foyer familial sans que des arrangements convenables aient été pris pour maintenir un contact avec l'autre parent soit reconnu contraire à l'« intérêt supérieur de l'enfant », sauf dans les situations d'urgence.

- 40. Le Comité recommande qu'un parent qui procède au retrait unilatéral d'un enfant du foyer familial ne soit pas autorisé à invoquer la période pendant lequelle il a assumé la garde et la surveillance exclusives de l'enfant à la suite du retrait, quelle qu'en soit la durée, comme argument pour obtenir une ordonnance parentale exclusive.
- 41. Le Comité recommande que le gouvernement fédéral donne suite aux recommandations du Sous-comité des droits de la personne et du Comité permanent des affaires étrangères et du commerce international de la Chambre des communes, recommandations qui figurent dans le rapport intitulé L'enlèvement international d'enfants : solutions de rechange.
- 42. Le Comité recommande que le ministre des Affaires étrangères et le Bureau des passeports continuent à chercher de nouvelles façons d'améliorer l'identification des enfants mineurs sur les documents de voyage, et qu'ils continuent de se pencher sur la possibilité d'exiger que chaque enfant ait son propre passeport.

F. Fausses allégations de mauvais traitements

Au cours de mon dernier appel, le juge s'est excusé en disant : « Ce pauvre père, que lui avons-nous fait? » Qu'ont-ils fait? Que m'a fait le système judiciaire? Cela va bientôt faire neuf ans que je n'ai pas vu mes enfants. [...] Il est très dur de faire l'objet de fausses accusations. Cela fait mal. C'est comme si l'on vous arrachait le coeur. Cela ne disparaîtra jamais, comme certains vous l'ont déjà dit. Vous pouvez faire toutes les recommandations que vous voulez mais les cicatrices sont là. Je les porterai jusqu'à ma mort. Mes enfants? Il faut que je demande à des amis de me les décrire. (Kim Cummins, réunion 20, Calgary)

Selon l'expérience de certains pères et d'après des groupes d'hommes d'un peu partout au Canada, quelques parents et leurs avocats font de fausses allégations de mauvais traitements physiques ou sexuels comme moyen d'empêcher le parent n'habitant pas avec l'enfant (habituellement le père) de le voir. Les témoins ont affirmé qu'il s'agissait là d'un problème grave qui non seulement prive la personne en cause de temps parental mais aussi contribue à un éloignement, une aliénation entre les enfants et leur père. Dans certains cas, ce détachement devient permanent. On peut éviter cette situation en maintenant le contact entre le parent et l'enfant grâce à l'exercice surveillé des responsabilités parentales (voir recommandation 35).

Plusieurs témoins ont fait référence à la décision des tribunaux dans l'affaire du révérend Dorian Baxter, qui a comparu devant le Comité à Toronto. La décision citait le témoignage, durant le procès, de Barbara Chisholm, professionnelle d'expérience en matière d'agressions d'enfants, laquelle a aussi comparu à Toronto:

Mme Chisholm a fait valoir que, d'après les récentes expériences, les allégations d'agressions sexuelles portées par la mère contre le père dans les conflits de garde sont répandues de nos jours et, en fait, sont devenues ce qu'elle a appelé « l'arme de choix »⁸².

Dans les situations où des allégations sont formulées, le père a la tâche difficile sinon impossible d'essayer de réfuter quelque chose qui ne s'est peut-être jamais produit.

Le problème, c'est que ces fausses allégations ne sont jamais réfutées. C'est très difficile, voilà le problème. C'est impossible à prouver, mais l'allégation reste consignée au dossier, comme quelque chose qui s'est vraiment produit. On dit qu'il n'y a pas de fumée sans feu et qu'il s'est certainement passé quelque chose. (Dory Gospodaric, Second Spouses of Canada, réunion 13, Toronto)

⁸² B(D) c. The Children's Aid Society of Durham, Cour de l'Ontario (Div. gén.), inédit, dossier ne 20962/87, 23 mars 1994.

Cela prend du temps et de l'argent. Le Comité a entendu bien des récits douloureux de pères qui avaient perdu contact avec leurs enfants pendant de longues périodes. Et, dans plusieurs cas, le contact ne s'est jamais rétabli.

Laissez—moi vous raconter l'histoire de ce collier. Il y a dix ans, j'ai promis à ma fille de lui offrir un collier de perles pour son vingt et unième anniversaire. Il y a à peu près un mois, je suis allé magasiner pour ce collier. La vendeuse m'a demandé pour qui c'était, et ce qu'elle aimait porter. Je lui ai dit que c'était pour le vingt et unième anniversaire de ma fille, mais je n'ai pas pu lui dire comment elle s'habillait habituellement ni ce qu'elle aimait porter. Après que j'eus choisi le collier, la vendeuse m'a dit qu'il était très beau et que ma fille avait beaucoup de chance, qu'elle était persuadée que ma fille l'aimerait beaucoup. Je lui ai simplement répondu : «Je ne le saurai probablement jamais. Il y a plus de sept ans que je ne lui ai pas parlé.» (Stan Gal, réunion 13, Toronto)

Ces témoins — des particuliers, des avocats et d'autres professionnels — ont expliqué qu'il y a de nombreuses possibilités d'introduire dans le système juridique des fausses allégations, lorsque les parents se querellent au sujet des enfants. Souvent, on signale des mauvais traitements ou de la négligence à un organisme de protection de l'enfance, ou on fait les allégations par voie d'affidavits ou d'actes de procédure soumis par l'avocat du parent accusateur. Les fausses allégations peuvent aussi prendre la forme d'un parjure dans un témoignage oral ou écrit, fait sous serment.

Dans le mémoire présenté au Comité par Parents Helping Parents, organisme manitobain fondé par Louise Malenfant en vue d'aider les parents ayant des problèmes en droit de la famille, Mme Malenfant a évoqué la question de la survalidation des fausses allégations d'abus sexuels faites lors d'actions en divorce au Manitoba.

Le problème des fausses allégations durant les procédures de divorce était majeur au Manitoba, puisque le PDG des Services à l'enfance et à la famille au Manitoba a reconnu que 25 p. 100 de toutes les enquêtes intervenaient durant une action en divorce. En juin 1996, le responsable des SEF de Winnipeg a admis également que seuls 15 p. 100 des allégations formulées dans les cas de divorce avaient des chances d'être véridiques. (Réunion 22)

Heidi Polowin, directrice des Services juridiques de la Société d'aide à l'enfance d'Ottawa-Carleton, a dit au Comité qu'en général, sur cinq cas de prétendues agressions faisant l'objet d'une enquête de la Société d'aide à l'enfance, trois se situaient dans un contexte de garde et de droit de visite et, sur ces trois cas, deux s'avéraient non fondés. Mme Polowin a mentionné que les cas sont signalés à la Société par des voisins, des médecins, des enseignants, des proches et des parents. Elle a tenu à préciser que le mot « non fondé » ne signifiait pas nécessairement qu'il s'agissait d'une fausse allégation, mais que la Société n'avait pas été en mesure, pour une raison ou pour une autre, de confirmer si la plainte était fondée.

Je ne veux pas dire que lorsque nous disons que deux allégations sur trois sont non fondées, nous prétendons qu'il s'agit de fausses allégations. Nous disons que nous ne leur trouvons pas de fondement. Ce sont deux choses différentes. Je crois que lorsque vous parlez de fausses allégations, vous y mettez un élément intentionnel. Ce n'est pas toujours le cas. Parfois, c'est simplement que nous ne trouvons aucun fondement aux allégations. (Réunion 24)

Au sujet de l'observation de Mme Polowin — que ce ne sont pas toutes les allégations non étayées qui sont fausses — , les ouvrages traitant de santé mentale contiennent de nombreux articles présentant des données contradictoires sur les taux de fausses allégations dans des cas signalés à des organismes voués à la protection et au bien-être des enfants.

Rosalyn Golfman, psychologue qui témoignait au nom d'un groupe professionnel de psychologues et de travailleurs sociaux effectuant des évaluations privées en matière de garde et de droit de visite et spécialisés dans les cas d'allégations d'abus sexuel des enfants, a mentionné la difficulté d'enquêter sur de telles allégations et de les prouver.

Pour ce qui est des allégations d'abus sexuel, particulièrement sur de jeunes enfants de moins de cinq ans, nous avons détecté une proportion relativement faible, mais non négligeable, de fausses allégations d'abus sexuel après la rupture d'une relation. Les fausses allégations peuvent survenir dans les cas de séparation de couples hautement conflictuels. Selon notre expérience, les parents et les enfants peuvent donner des interprétations erronées ou avoir des perceptions déformées de la relation entre l'enfant et l'ex-partenaire. Les jeunes enfants sont très exposés à la mémoire fictive et susceptibles de faire des récits inexacts lorsqu'on leur pose des questions répétées et lorsqu'ils racontent leur histoire à de nombreuses reprises en réponse à des questions suggestives. De même, l'anxiété d'un parent au sujet de l'abus peut affecter subtilement la capacité de l'enfant de faire un récit exact. C'est réellement l'élément le plus important. C'est très subtil. Les parents peuvent observer chez leurs enfants des comportements révélateurs d'abus sexuel, mais fréquemment ces mêmes comportements peuvent aussi s'expliquer par les aspects de la relation conflictuelle ou le traumatisme de la séparation. Souvent, ces comportements ressemblent au syndrome du stress post-traumatique. (Réunion 22, Winnipeg)

Une partie du débat porte sur la question de l'habileté et des tendances des enfants à mentir à propos de situations aussi graves. Pendant longtemps, bon nombre d'intervenants ont dit que les enfants étaient incapables de mentir ou, du moins, qu'il était peu probable qu'ils mentent au sujet de mauvais traitements. Par conséquent, toute observation faite par un enfant laissant entendre que des mauvais traitements avaient eu lieu était suffisante pour justifier le signalement de présumés mauvais traitements.

En 1984, Berliner et Barbieri déclaraient qu'« il existe peu de preuves, sinon aucune, indiquant que l'on ne peut pas se fier aux déclarations faites par les enfants, et absolument aucune qui puisse nous inciter à croire que les enfants font souvent des fausses accusations d'agressions sexuelles ou interprètent mal des comportements innocents d'adultes⁸³». Dans une autre étude, Dziech et Schudson en arrivaient à la conclusion suivante : « Les enfants n'ont pas coutume de prétendre sans raison qu'ils ont été agressés sexuellement. La sous-déclaration et le déni sont beaucoup plus courants... La notion des adultes selon laquelle les enfants mentent au sujet des agressions sexuelles apparaît illogique aux personnes qui les ont examinés⁸⁴».

Plus récemment, toutefois, d'autres études ont révélé que des enfants peuvent dire ce que les personnes qui leur sont chères souhaiteraient qu'ils disent, surtout lorsqu'on leur demande à plusieurs reprises de parler d'une situation problématique. À ce sujet, Ceci et Bruck écrivaient, en 1993, que « l'on peut amener les enfants à faire de fausses déclarations ou des déclarations inexactes à propos d'événements très cruciaux qu'ils ont vécus personnellement⁸⁵ ». Les facteurs qui peuvent influer sur la façon, pour un enfant, de raconter des expériences difficiles sont complexes, ce qui ajoute à la difficulté inhérente d'enquêter sur des cas signalés de mauvais traitements infligés à des enfants, en particulier des agressions sexuelles.

Lors d'un examen complet des recherches portant sur la fréquence des allégations d'abus sexuels, Judith Adams faisait la constatation suivante : « Le contexte dans lequel les allégations sont faites semble

⁸³ L. Berliner et M.K. Barbieri, « Testimony of the Child Victim of Sexual Assault », Journal of Social Studies, vol. 40 (1984), p. 125-137.

⁸⁴ B.W. Dzietch et C.B. Schudson, On Trial: America's Courts and their Treatment of Sexually Abused Children (Boston: Beacon Publishers, 1989).

⁸⁵ S.J. Ceci et M. Bruck, «The Suggestibility of the Child Witness: A Historical Review and Synthesis», Psychological Bulletin, vol. 113 (1993), p. 403-429.

critique. Call (1994) a analysé 7 études portant sur le taux d'allégations d'agressions sexuelles faites lors d'actions en divorce et a constaté que ces taux variaient de 15 p. 100 à 79 p. 100. Ceci et Bruck (1995) ont cité plusieurs études portant sur des allégations d'agressions sexuelles lors de divorces, études dans lesquelles les taux d'allégations allaient de 23 p. 100 à 35 p. 100⁸⁶ ». Les enfants se confient souvent aux parents qui en ont la garde. Ce sont eux qui décident s'ils doivent signaler la question, s'ils doivent demander qu'une enquête soit faite à ce sujet ou s'ils doivent prendre d'autres mesures pour protéger l'enfant. Évidemment, la question devient encore plus épineuse lors des procédures de séparation ou de divorce.

Dans un article paru en 1994 sur les prétendus abus sexuels des enfants lors de différends relatifs à la garde et au droit de visite, l'avocate Lise Helene Zarb a déclaré que la violence sexuelle envers les enfants est une situation répandue dans la société canadienne, mais dont on ne connaît pas l'envergure exacte⁸⁷. Elle a parlé des risques pour celui qui fait une fausse allégation d'abus, notamment d'être tenu responsable d'avoir mal protégé l'enfant, de voir ses droits de garde remis en question si l'on découvre qu'il n'est pas un « parent coopératif », sans compter les contrariétés et les frais juridiques. Les tribunaux ont aussi de graves problèmes, conclut Mme Zarb, car il n'existe pas de lignes directrices que les juges peuvent utiliser pour évaluer ces allégations ni de directives législatives concernant le degré ou le type d'accès à accorder.

Dans un document présenté au Comité en juin 1998, le professeur Nick Bala a examiné les difficultés que pose la recherche sur les fausses allégations d'abus⁸⁸. La proportion des allégations de mauvais traitements qui sont fausses varie avec le temps et il est extrêmement difficile de les quantifier d'une manière qui puisse être d'une quelconque utilité. Le professeur Bala souligne que les hommes ayant réellement infligé des mauvais traitements se défendent souvent en disant que les allégations de leur partenaire sont fabriquées de toutes pièces ou que les craintes exprimées par les enfants au sujet des visites sont le résultat du comportement aliénant de leur mère. Il est très important de remarquer que le problème de société des hommes agresseurs qui nient les mauvais traitements est plus grave que celui des femmes qui exagèrent ou mentent dans leurs allégations. Il faut traiter chaque cas individuellement, et les juges recourront souvent à des experts pour discerner les fausses allégations de celles qui ont un certain fondement.

Quel que soit leur nombre, les fausses allégations sont source de chagrin et de douleur pour le parent accusé. Le Comité a entendu les témoignages de nombreux pères qui, accusés à tort, ont été détruits sur les plans financier, social et affectif.

Ces fausses accusations placent un fardeau sur l'accusé, qui voit, d'un seul coup, sa vie détruite sur le plan psychologique, financier et social; le parent accusé est immédiatement privé de tout contact avec les enfants, ce qui était l'objectif recherché au départ. La manoeuvre réussit car c'est une manoeuvre très efficace. Je voudrais jouer un rôle positif dans la vie de nos enfants. Une seule fausse accusation a supprimé cette possibilité et je n'ai guère d'espoir d'être réuni un jour avec nos enfants. (Larry Shaak, réunion 21, Regina)

D'autres pères ayant témoigné devant le Comité ont ajouté des observations personnelles au sujet des conséquences pénibles des fausses allégations faites par leurs ex-épouses avec intention ou par malveillance. Tony McIntyre, de l'organisme Men Supporting Men Inc., a parlé du soutien qu'il apportait aux hommes visés par de telles allégations en Colombie-Britannique.

Judith K. Adams, «Investigation and Interviews in Cases of Alleged Child Sexual Abuse: A Look at the Scientific Evidence», *Issues in Child Abuse Allegations*, vol. 8, No. 3/4 (1989), p. 136.

Lise Helene Zarb, « Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is the Best Interests of the Child? », Canadian Journal of Family Law, vol. 12, No. 1, 91-114 (1994), p. 92.

⁸⁸ Nicholas Bala, « Violence entre conjoints associée aux différends relatifs à la garde des enfants et au droit d'accès », 3 juin 1998; document présenté au Comité mixte spécial sur la garde et le droit de visite des enfants.

Certains hommes se sentent impuissants devant les fausses allégations dont ils font l'objet. Il suffit semble-t-il qu'une femme profère des allégations contre un homme pour que les travailleurs sociaux et les avocats lui donne automatiquement le bénéfice du doute, et ils entreprennent des recours contre l'homme comme si les allégations avaient été prouvées. La frustration, qui souvent fait suite à la douleur et à la perte de personnes proches, ainsi qu'à la peine d'être séparé des enfants, conduit souvent à la détérioration rapide de plusieurs domaines de la vie de ces hommes. Ils ne peuvent plus fonctionner normalement au travail, et nombre d'entre eux perdent leur emploi. Quand on n'a pas d'argent, le système juridique devient d'autant moins accessible. Ils se tournent en dernier recours vers les services sociaux, où ils sont censés recevoir de l'aide. Mais ils se cognent le nez contre des portes fermées ou un accueil des plus froids. [...] Les fausses accusations de violence sexuelle contre un enfant constituent la forme de violence la plus virulente pour la personne honnête qui en est victime. Les conséquences peuvent être dévastatrices quand la personne tente de prouver son innocence. (Réunion 19, Vancouver)

Des témoins qui ont parlé du problème des allégations malveillantes de mauvais traitements ont laissé entendre que l'actuel système d'enquête sur ces plaintes n'était pas adéquat et que cela ne faisait qu'aggraver le problème. Ils ont dit craindre que, dans certaines situations extrêmes, il se peut que les avocats ou d'autres professionnels conseillent au parent de faire de fausses allégations pour ainsi étayer leur requête restrictive à l'égard de l'autre parent.

À mon avis, les évaluations finissent par priver les enfants de relations significatives avec leurs deux parents. Elles sont utilisées à mauvais escient. Elles reposent sur une attitude politique selon laquelle la parole d'une femme a beaucoup plus de poids que celle d'un homme; les hommes qui sont accusés ne peuvent donc pas se défendre, même s'ils subissent une évaluation psychologique, s'ils passent un test au détecteur de mensonges ou s'ils doivent se prêter à une mesure « pénienne » pour déterminer s'ils sont effectivement coupables d'agression. Même s'ils n'ont rien fait de mal, leur nom peut demeurer inscrit dans le registre des agresseurs d'enfants et ils peuvent être empêchés de voir leurs enfants sauf sous une supervision très rigoureuse. Je sais bien qu'il y a des agressions. Après 15 ans comme consultante pour la Société d'aide à l'enfance, je sais que des enfants sont agressés sexuellement, physiquement, affectivement. C'est pourquoi je trouve tellement important de ne pas accorder crédit aux allégations mensongères, surtout quand la vie et l'avenir des enfants sont en jeu. (Marty McKay, psychologue clinicienne, réunion 13, Toronto)

D'autres témoins ont suggéré que la formulation même de fausses allégations de violence envers les enfants devienne un acte criminel. Le révérend Dorian Baxter, de la National Association for Public and Private Accountability, a présenté la recommandation suivante :

[En raison des répercussions personnelles et financières catastrophiques pour la personne accusée à tort], je crois qu'il faut mettre en place un mécanisme de contrôle et d'équilibrage des services sociaux offerts. Je crois que le mieux serait un conseil civil d'examen des services de protection et de bien-être à l'enfance, composé de gens à l'aise, de professionnels, qui sont respectés et qui sont prêts à donner du temps pour déterminer leur mérite. (Réunion 14, Toronto).

Il faut décourager la formulation d'allégations injustifiées par un conjoint à l'endroit de l'autre. Par contre, plusieurs membres ont insisté pour que les changements éventuellement adoptés pour décourager les fausses allégations ne soient pas des facteurs qui risquent de limiter, d'entraver ou de bloquer l'expression d'inquiétudes légitimes à l'égard de la sécurité de l'enfant, même si ces inquiétudes finissent par se révéler non fondées. Les membres du Comité espèrent que la réduction des différends lors d'un divorce contribuera à la diminution de l'incidence des fausses allégations intentionnelles. Parmi les moyens les plus prometteurs pour réduire les différends, mentionnons l'éducation sur les responsabilités parentales pendant le processus

de divorce. De tels programmes confèrent aux parents des compétences à appliquer dans les négociations au sujet des enfants après la séparation et font prendre conscience du tort causé par les fausses allégations de mauvais traitements.

Même si le Comité estime qu'il faut d'abord tenir compte de la sécurité des enfants, les membres croient qu'il faudrait aussi prévoir un recours juridique pour contrer les fausses allégations de sévices. Quelques-uns des membres sont en outre d'avis que les incidences de fausses allégations dans les différends ayant trait à la garde et au droit de visite justifient qu'on étudie en profondeur comment s'établissent les affidavits, en droit de la famille, comment se font les actes de procédure et comment le secret professionnel peut parfois occulter le fait que l'avocat a conseillé à son client de faire de fausses allégations.

Aux États-Unis, certains gouvernements d'État ont adopté des interdictions concernant la fausse déclaration d'abus ou de négligence à l'égard des enfants. Les lois de 22 États et celles du district de Columbia imposent des peines pour fausses déclarations, habituellement les fausses déclarations faites « sciemment » ou « délibérément »⁸⁹. Dans la plupart des cas, les sanctions sont des amendes ou des peines d'emprisonnement. Des sanctions semblables peuvent être imposées dans tous les États à l'endroit des personnes qui, sciemment ou délibérément, omettent de signaler des cas possibles d'enfant négligé ou maltraité.

G. Poursuites pour parjure devant les tribunaux civils

Certains des témoins qui nous ont fait part de leur expérience personnelle au niveau de la garde et du droit de visite des enfants ont affirmé que l'autre partie au différend avait soit fait une fausse déclaration sous serment, soit menti dans son témoignage. Or, le règlement des différends en droit de la famille, en particulier ceux qui concernent la garde et le droit de visite des enfants, a tendance à dépendre beaucoup de la crédibilité des parties, qui sont souvent les principaux témoins. Même des personnes parfaitement franches ont une vision très personnelle des événements intervenus durant et après un mariage. Les juges ont souvent du mal à décider quelle version privilégier, surtout quand la totalité des témoignages est présentée sous la forme d'affidavits. Il arrive souvent que les juges ne se sentent pas en mesure de déterminer exactement qui dit la vérité au sujet de chaque allégation, mais ils tirent néanmoins des conclusions générales quant à la version des faits qui leur semble la plus crédible.

Les témoins ont fait ressortir les dommages que causent, à des relations familiales déjà difficiles, des témoignages qui contiennent de fausses déclarations incendiaires au sujet de l'autre partie. Dans la mesure où le fait de mentir dans des affaires de droit de la famille est perçu comme une pratique sinon acceptée, à tout le moins non contestée, on porte atteinte à la crédibilité et à la réputation du régime du droit de la famille et des tribunaux de la famille. Deborah Powell, qui représente l'association Fathers Are Capable Too (FACT), a cité un extrait d'une allocution du juge Mary Lou Benotto sur l'éthique et le droit de la famille où celle-ci renvoyait à la remarque suivante figurant dans le premier rapport sur la justice civile en Ontario :

[...] la principale plainte du public à l'endroit des avocats concerne la détérioration des relations familiales du fait des allégations formulées dans ces affidavits où l'on peut — c'est bien connu—se parjurer en toute impunité. (Réunion n° 7)

Il est fort possible qu'il existe effectivement des cas de faux témoignages qui devraient être contestés. Le fait de faire en toute connaissance de cause une fausse déclaration sous serment ou par la voie d'un affidavit est

National Clearinghouse on Child Abuse and Neglect Information, « Reporting Penalties », Statutes at Glance Fact Sheet, p. 1.

un acte criminel passible de sanctions aux termes du *Code criminel*⁹⁰. Cette infraction comprend plusieurs éléments, notamment la fausse déclaration, le fait que l'inculpé savait pertinemment que la déclaration était fausse et le fait que l'inculpé avait l'intention délibérée d'induire en erreur. Ces éléments montrent que seules des déclarations manifestement fausses et manifestement délibérées peuvent donner lieu à une accusation de parjure aux termes du *Code criminel*. Le fait qu'une personne considère qu'il y ait eu malhonnêteté ne signifie pas pour autant qu'un tribunal rende une condamnation pour parjure. D'ailleurs, en droit de la famille, les versions différentes d'un même événement sont la règle et non l'exception, vu la nature des procédures, le degré d'acrimonie entre les parties et le fait que les seuls témoins de la plupart des incidents pertinents sont les parties elles-mêmes.

Outre le parjure prévu au *Code criminel*, deux autres dispositions du Code pourraient s'appliquer aux fausses allégations de mauvais traitements, soit les articles sur le méfait public et l'entrave à la justice. L'article 140 du Code stipule qu'il y a infraction lorsque quelqu'un amène un policier à commencer ou à continuer une enquête en faisant une fausse déclaration qui accuse une autre personne d'avoir commis une infraction. L'article 139, par ailleurs, crée une infraction de toute tentative volontaire d'entraver le cours de la justice.

Les deux infractions pourraient, tout comme les articles 131 et 132 sur le parjure, avoir une application concernant les fausses allégations délibérées de mauvais traitements et, de l'avis du Comité, le ministre de la Justice devrait en examiner la pertinence sur ce plan. On pourrait ainsi déterminer si les trois dispositions existantes suffisent à régler le problème, si leur efficacité pourrait être renforcée par d'adoption d'une nouvelle politique de mise en accusation ou s'il faut rédiger une disposition plus précise.

Recommandation

43. Le Comité recommande que, pour contrer les fausses accusations intentionnelles de mauvais traitement et de négligence, le gouvernement fédéral évalue les dispositions du *Code criminel* relatives aux fausses déclarations dans les affaires relevant du droit de la famille, et qu'il élabore des politiques d'intervention dans les cas où, de toute évidence, il y a eu méfait, entrave à la justice ou parjure.

H. Éloignement parental et aliénation parentale

Certains témoins ont raconté de quelle manière ils avaient été séparés de leurs enfants après le divorce. La plupart des récits provenaient des pères, mais quelques mères et des grands-parents ont aussi donné des détails sur la façon dont leur relation avec un enfant a été entravée au cours de la dispute des parents après le divorce. Le Comité a entendu la déchirante histoire d'une jeune femme de Vancouver qui a été, avec son frère, retirée à sa mère par son père. D'après cette jeune adulte, elle et son frère avaient entendu tellement de remarques négatives sur leur mère qu'ils avaient commencé à y croire.

Parfois, l'un des parents fait une fausse allégation à la police, aux organismes de protection de l'enfance et aux tribunaux pour ainsi empêcher l'autre de passer du temps avec son enfant. Il arrive aussi qu'un parent monte l'enfant contre l'autre en laissant entendre qu'il est dangereux. L'enfant devient souvent méfiant envers l'autre parent et demande de passer moins de temps avec lui ou même de ne plus le voir du tout. Les membres ont été frappés par la peine générée par de telles situations, tant pour l'enfant que pour le parent visé.

⁹⁰ Articles 131 et 132.

Certains des témoins séparés de leurs enfants ont parlé du syndrome de l'aliénation parentale et ont renvoyé le Comité à la recherche d'un pédopsychiatre américain, le Dr Richard Gardner, qui décrit ce syndrome comme une situation où l'un des parents, délibérément ou non, cherche à éloigner l'enfant de l'autre parent. Des témoins ont employé l'expression « syndrome psychologique » tandis que d'autres ont parlé d'un symptôme ou d'un trouble.

Les professionnels en santé mentale parlent de l'aliénation parentale depuis nombre d'années, mais c'est le Dr Gardner qui l'a vulgarisée et qui a proposé de la considérer comme un syndrome. Dans son ouvrage intitulé *The Parental Alienation Syndrome*, il définit l'aliénation parentale comme « une perturbation des rapports, situation dans laquelle les enfants ne subissent pas simplement un lavage de cerveau systématique et intentionnel, mais où ils sont, dans leur subconscient et leur inconscient, programmés par un parent contre l'autre »⁹¹. Selon le Dr Gardner, ce syndrome se produit jusqu'à un certain point dans 90 p. 100 des différends relatifs à la garde⁹².

Cette statistique, en particulier, a suscité énormément de débats dans les milieux de la justice et de la santé mentale. Peu de personnes ont remis en question le fait que des parents puissent tenter d'éloigner leurs enfants de l'autre parent, mais bon nombre de professionnels ont dit douter que ces situations soient aussi fréquentes que le prétend le Dr Gardner. D'autres critiques avancent que le travail de ce dernier sert à faire valoir que tout enfant désirant mettre fin à une relation avec le parent non cohabitant, ou du moins à réduire les contacts, doit nécessairement avoir subi l'influence du parent gardien. Or, selon eux, il peut y avoir d'autres explications valides à l'attitude distante d'un enfant vis-à-vis d'un parent et ces raisons pourraient être occultées, au détriment de l'enfant, par l'utilisation erronée des théories du Dr Gardner.

Comme Peter Jaffe et Robert Geffner l'ont souligné, le fait de diagnostiquer un syndrome d'aliénation parentale pourrait empêcher l'évaluation objective de chaque cas et cacher ainsi le véritable problème qui existe entre un parent et un enfant, au détriment éventuel de l'enfant⁹³. Cela est particulièrement troublant, comme en témoigne le résultat de certaines recherches :

Bon nombre de juges, d'agents de police, de travailleurs sociaux et de professionnels en santé mentale qui n'ont pas de formation particulière dans le domaine de la violence familiale et des mauvais traitements infligés aux enfants sont plus susceptibles que les personnes ayant une telle formation de croire que bon nombre de fausses allégations d'abus sexuels sont faites lors d'actions en divorce⁹⁴.

Si un enfant dévoile des mauvais traitements infligés par le parent non cohabitant, le parent qui décide de prendre des mesures risque d'être perçu comme utilisant cette allégation pour tenter d'éloigner l'enfant de l'autre parent. MM. Jaffe et Geffner soulignent que Richard Gardner a lui-même évoqué ce problème :

91 Richard A. Gardner, The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals (Cresskill, N.J.: Creative Therapeutics, 1992)

Peter G. Jaffe et Robert Geffner, « Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals » (1998), p. 380-381.

94 M.D. Everson, B.W. Boat, S. Bourg et K.R. Robertson, « Beliefs among Professionals about Rates of False Allegations of Child Sexual Abuse », *Journal of Interpersonal Violence*, vol. 11, p. 541-553, cité dans *Ibid.*, p. 380.

Bon nombre d'attaques visent la fréquence des cas alléguée par le Dr Gardner, de même que sa recherche et ses compétences. Cheri Wood a résumé ainsi ces préoccupations : « Gardner publie lui-même ses travaux. Cela signifie qu'il fait reposer ses idées uniquement sur des impressions cliniques tirées de ses propres cas et que ses travaux ne sont pas revus par des pairs professionnels indépendants... Les statistiques de Gardner ne correspondent pas à celles qui figurent dans les études nationales». Cheri L. Wood, « The Parental Alienation Syndrome: A Dangerous Area of Reliability », Loyola of Los Angeles Law Review, printemps 1994.

Même Gardner (1996), qui a inventé l'expression *syndrome d'aliénation parentale*, s'est dit inquiet de l'utilisation abusive de ce diagnostic et du risque que les professionnels fassent une évaluation hâtive et proposent des arrangements de garde en conséquence⁹⁵.

Il existe un lien entre les fausses allégations de mauvais traitements et l'aliénation parentale. Certains soutiennent que les fausses allégations contre le parent non cohabitant revèlent une tentative d'aliénation parentale de la part de l'autre. L'incidence des fausses allégations faites délibérément dans le cadre de différends pour la garde et le droit de visite est beaucoup contestée. De nombreux témoins ont déclaré que le cas était fréquent, mais cela est très peu étayé par les ouvrages de sciences sociales. Thoennes et Tjaden ont enquêté sur 9 000 cas de divorce et constaté qu'il y avait des allégations de mauvais traitements dans moins de 2 p. 100 d'entre eux. Fait intéressant, cette étude a également montré que 48 p. 100 de ces allégations avaient été faites par des mères contre les pères, 30 p. 100 par des pères contre les mères et leur nouveau conjoint, et 22 p. 100 par des tiers contre les mères ou les pères⁹⁶.

Selon des témoins, les fausses allégations de mauvais traitements sont symptomatiques des divorces hautement conflictuels, mais on ne peut affirmer, d'après la documentation, que ces allégations sont plus souvent faites dans le cadre de conflits relatifs à la garde et au droit de visite qu'à d'autres moments. En 1992, Jon Conte s'exprimait ainsi : « À ma connaissance, il n'existe aucune étude concrète qui ait établi que les fausses accusations de violence sexuelle soient plus susceptibles d'être faites lors de divorces ou de conflits de garde »⁹⁷.

Par suite des critiques ayant entouré ses travaux et de l'utilisation peut-être exagérée du syndrome de l'aliénation parentale aux États-Unis, le Dr Gardner a publié en 1996 un addenda à son livre.

J'ai vu des rapports de professionnels de la santé mentale qui traitaient de cas légers à moyens de SAP, peu judicieusement ou à tort, comme s'il s'agissait de cas graves, recommandant le transfert de la garde au père voire l'emprisonnement de la mère dont les degrés d'endoctrinement étaient minimes et pouvaient même être corrigés si on lui garantissait qu'elle demeurerait le principal responsable de la garde de l'enfant. J'ai vu des cas où des tribunaux et des professionnels de la santé mentale avaient évalué le SAP en se fondant sur l'endoctrinement de la mère et non sur le degré d'influence sur l'enfant. Dans ces cas, les enfants ont peut-être fait montre de légers symptômes du SAP, mais la mère a été traitée comme si les enfants avaient été gravement atteints et la garde lui a donc été retirée⁹⁸.

En plus des histoires personnelles d'aliénation de leurs enfants racontées par des pères, le Comité a entendu les témoignages de deux chercheurs canadiens sur la question de l'aliénation parentale. Le professeur Glenn Cartwright, de l'Université McGill, a déclaré que les statistiques du Dr Gardner donnaient une image exacte de la situation qui se produit chez de nombreuses familles où il y a divorce.

Le syndrome de l'aliénation parentale est extrêmement grave, et je pèse mes mots. Il n'est rien moins que le meurtre symbolique du parent qui n'a pas la garde dans la vie de l'enfant. Il supprime non seulement le parent, mais également les grands-parents, les tantes, les oncles, les amis, etc. L'enfant perd toute la moitié de sa famille et n'a même pas le droit de pleurer cette perte. (Glenn Cartwright, Université McGill, réunion 16, Montréal)

⁹⁵ *Ibid.*, p. 380.

Nancy Thoennes et Patricia Tjaden, «The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes », Journal of Child Abuse and Neglect, vol. 14 (1990), p. 152-153.

⁹⁷ Jon R. Conte, « Has This Child been Sexually Abused? Dilemmas for the Mental Health Professional Who Seeks the Answer », Criminal and Justice Behavior, vol. 54 (1992), p. 62.

⁹⁸ Richard A. Gardner, Addendum III: Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in their Children, (Cresskill NJ: Creative Therapeutics, 1996).

Rapport du Comité mixte spécial sur la garde et le droit de visiste des enfants -

Pamela Stuart-Mills, de l'organisme Parental Alienation Information Network, a parlé des enfants qui sont éloignés d'un parent comme des « enfants du mensonge », parce qu'on les empêche de comprendre les véritables raisons de l'absence, dans leur vie, du parent exclus. Mme Stuart-Mills a également mentionné que l'aliénation parentale n'arrive pas seulement aux pères.

J'aimerais également vous rappeler que les remarques formulées par les groupes d'hommes s'appliquent également aux femmes mais que celles-ci ont tellement honte d'être rejetées et séparées de leurs enfants que beaucoup d'entre elles ont peur d'en parler, en raison du stigmate social qui y est associé. Les clichés qui sont associés à la maternité sont tels que beaucoup de femmes hésitent à se manifester et à faire valoir leurs droits devant les tribunaux, tout simplement à cause du stigmate social. (Pamela Stuart-Mills, Parental Alienation Information Network, réunion 16, Montréal)

Les membres du Comité ont pris très au sérieux les témoignages sur l'aliénation parentale, mais sont également conscients des préoccupations concernant le stade peu avancé des recherches sur cette question. Les témoins ont surtout recommandé que l'on fasse plus de recherches, que l'on se renseigne davantage sur les dangers des comportements parentaux qui pourraient causer l'aliénation, et que les professionnels travaillant auprès des familles qui se séparent ou qui divorcent reçoivent une formation à ce sujet.

Recommandation

44. Le Comité recommande que le gouvernement fédéral travaille de concert avec les gouvernements provinciaux et territoriaux pour inciter les organismes de protection de l'enfance à donner suite aux enquêtes sur les allégations de mauvais traitements faites dans le cadre de différends sur la responsabilité parentale, afin d'établir des statistiques qui permettront de mieux comprendre ce problème.



Chapitre 6 — Questions autochtones

En vertu du paragraphe 91(24) de la *Loi constitutionnelle de 1867*, le Parlement du Canada est habilité à légiférer sur « les Indiens et les terres réservées pour les Indiens ». Ce pouvoir a été exercé lors de l'adoption de la *Loi sur les Indiens*, qui prévoit un système complexe d'enregistrement des Indiens, d'administration de leurs terres et de réglementation de leur vie. Depuis l'adoption de cette loi, il y a une distinction, en ce qui concerne le régime légal et les avantages y afférents, entre les Indiens inscrits et les Indiens non inscrits. Par exemple, de 1955 à 1985 en vertu de la *Loi sur les Indiens*, une Indienne inscrite qui épousait un Indien non inscrit ou un non-Indien renonçait au statut d'Indien, pour elle et pour les enfants à naître. Les Inuit, les Métis et les Indiens non inscrits ne sont pas, pour leur part, visés par ces dispositions.

Pendant de nombreuses années, les organisations autochtones ont tenté de sensibiliser les Canadiens aux problèmes sanitaires et sociaux des Autochtones vivant ou non dans les réserves. Le logement continue d'être inadéquat pour bon nombre d'entre eux, et la plupart des réserves manquent de logements. Bien des réserves situées dans les zones rurales ou dans des régions éloignées n'ont pas l'eau courante, les installations d'égouts et de plomberie sont déficientes, et le taux d'incendie est élevé. L'état de santé des Indiens inscrits est extrêmement mauvais, et les jeunes Indiens ont une espérance de vie beaucoup plus courte que le reste de la population. La participation au marché du travail est très faible dans de nombreux secteurs, et les Autochtones sont trois fois plus susceptibles que les non-Autochtones de se retrouver dans des pénitenciers fédéraux⁹⁹.

La secrétaire d'État à l'Enfance et à la Jeunesse, Ethel Blondin-Andrew, a affirmé au Comité que c'est en partie leur prédominance dans les collectivités autochtones qui confère aux enfants une telle importance pour les Autochtones.

Les enfants autochtones représentent une grande proportion de leur population. Environ 40 p. 100 des enfants autochtones ont moins de 15 ans, par rapport à 20 p. 100 chez les Canadiens non autochtones. Ces données sont tirées du recensement de 1994. L'Institut canadien de la santé des enfants a constaté que le gros de la population du Canada s'approche de l'âge de la retraite alors que, chez les Autochtones, la majorité de la population s'approche de l'âge de reproduction. Qui plus est, les femmes autochtones ont davantage d'enfants que les femmes non autochtones. (L'honorable Ethel Blondin-Andrew, secrétaire d'État à l'Enfance et à la Jeunesse, réunion 45)

Mme Blondin-Andrew a aussi fait référence aux traditions culturelles qui attribuent aux enfants la place centrale des très intimes structures familiales élargies. En plus de souligner l'importance des enfants pour leurs communautés, la secrétaire d'État s'est dite préoccupée de l'absence de statistiques sur le bien-être des enfants autochtones, surtout en cas de séparation ou de divorce des parents. C'est un aspect que le Comité est heureux de connaître, et il propose que les problèmes des enfants autochtones affectés par des perturbations familiales soient étudiés par le Comité sénatorial permanent des peuples autochtones, dans le cadre de son examen de l'autonomie autochtone.

Il n'y a pas de loi fédérale qui traite des rapports entre les Indiens inscrits et la plupart des aspects du droit commun, comme le droit de la famille. Par conséquent, les Autochtones, y compris les Indiens inscrits, sont régis par la *Loi sur le divorce* lorsqu'ils demandent le divorce et des mesures de redressement provisoires, et

Bradford W. Morse, éd., Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1991), p. 6.

par les lois provinciales en matière de droit de la famille pour les autres questions comme le partage des biens. Les lois provinciales sur les biens matrimoniaux peuvent établir les droits de propriété et de possession des biens meubles des Indiens vivant dans les réserves, mais les lois provinciales ne peuvent pas changer quoi que ce soit à la propriété ou à la possession de terres de réserve 100. Les tribunaux ne peuvent pas invoquer les lois provinciales pour ordonner la partition et la vente de terres de réserve. Cependant, un tribunal peut ordonner une indemnisation afin de rajuster le partage des biens familiaux entre les conjoints 101.

Les lois provinciales sur la protection de l'enfance s'appliquent également aux Indiens vivant dans les réserves. Les questions de protection des enfants sont visées par les lois provinciales, même si un certain nombre de provinces et de territoires ont créé des organismes distincts de protection de l'enfance dont les services sont destinés aux Autochtones. Les enfants autochtones sont surreprésentés dans les organismes de protection de la jeunesse. Il peut y avoir controverse lorsque l'intérêt de la collectivité autochtone à exposer l'enfant à la culture autochtone ne correspond pas aux préoccupations de l'organisme provincial de protection de l'enfance au sujet des autres besoins de l'enfant.

Le rapport de 1996 de la *Commission royale sur les peuples autochtones* fait état de la prise en main de la protection de l'enfance par la collectivité de la Première nation des Spallumcheens, près de Vernon, en Colombie-Britannique. Le chef Wayne Christian, qui a lui-même vécu en foyer nourricier, a été amené à agir par suite du suicide de son frère, qui avait essayé en vain de réintégrer sa collectivité après un séjour dans une famille d'accueil. En 1980, le chef Christian a convaincu sa collectivité d'adopter un règlement sur la protection de l'enfance, sous le régime de la *Loi sur les Indiens*. On a réussi à persuader le gouvernement fédéral de ne pas annuler ce règlement, et le gouvernement de la Colombie-Britannique a accepté, grâce aux pressions exercées par la communauté autochtone, de collaborer à sa mise en application. La collectivité des Spallumcheens est la seule à avoir atteint ce degré d'autonomie dans le domaine de la protection de l'enfance¹⁰².

L'adoption est un autre domaine qui préoccupe les Autochtones, parce que les lois provinciales régissant l'adoption peuvent être incompatibles avec les traditions culturelles à ce sujet, en particulier chez les Inuit. On a déjà établi que le droit coutumier autochtone ou les lois provinciales pouvaient s'appliquer à l'adoption d'enfants indiens ou non indiens par des parents indiens. L'adoption d'un enfant indien par des parents indiens ne change rien à l'appartenance de l'enfant à la bande, à moins que le code d'appartenance à la bande ne modifie cette règle fondamentale. Il y a également un précédent permettant l'adoption conformément aux coutumes inuit 103.

En plus de toucher la protection de l'enfance et la violence familiale, les recommandations de la Commission royale ayant trait aux enfants et aux familles ont préconisé ce qui suit : que les gouvernements reconnaissent que le droit de la famille appartient généralement au centre du champ de compétence de gouvernements autochtones autonomes et que les nations autochtones peuvent prendre des initiatives dans ce domaine sans obtenir au préalable l'accord du fédéral, des provinces ou des territoires; que les gouvernements reconnaissent la validité du droit coutumier autochtone dans le domaine du droit de la famille, notamment en matière de mariage, de divorce, de garde et d'adoption d'enfants, et qu'ils modifient leurs lois en conséquence; et que les nations ou organisations autochtones consultent les gouvernements dans les domaines du droit de la famille pour résoudre les problèmes rencontrés.

¹⁰⁰ Jack Woodward, Native Law, Carswell, Toronto, 1996, p. 129.

¹⁰¹ George c. George (1992), [1993] 2 C.N.L.R. 112 (B.C.S.C.)

¹⁰² Rapport de la Commission royale sur les peuples autochtones, vol. 3 (1996), disponible en ligne à l'adresse suivante : http://w.w.w.indigenous.bc.ca/rcap/rcapengv3/ch1&2-vol3.doc.

¹⁰³ Woodward, p. 348-349.

Lors de ses déplacements dans tout le Canada, le Comité a entendu plusieurs témoins parler de questions intéressant les peuples autochtones. Ont également été représentés le Métis National Council of Women, la Pauktuutit (l'Inuit Women's Association), la Native Women's Association of Canada, l'Assemblée des Premières Nations et le Ralliement national des Métis. Ces témoins, venant de diverses collectivités et exprimant le point de vue d'hommes et de femmes, ont soulevé un certain nombre de problèmes importants et complexes. Ils ont souligné le caractère inapplicable de bon nombre d'aspects du système décisionnel concernant la garde et le droit de visite des enfants, ainsi que l'inaccessibilité, pour des personnes qui vivent dans les régions rurales, pauvres ou éloignées, par exemple dans le Grand Nord, à bon nombre des services que la société offre aux personnes qui se séparent ou divorcent. Cela risque davantage de se produire si ces personnes ne parlent ni anglais, ni français. Les normes et les critères qui peuvent convenir aux familles qui font partie de la population majoritaire dans les zones urbaines ne conviennent pas nécessairement aux membres des collectivités éloignées.

L'impact de la pauvreté sur les gens qui vivent des situations difficiles ajoute un autre élément de complexité. Les cas les plus difficiles sont souvent ceux des couples mixtes formés d'Autochtones et de non-Autochtones, où le conflit de culture vient s'ajouter aux différends des couples qui se séparent. La résolution de ces problèmes multiples nécessite une étude plus poussée que celle du Comité. Il est également urgent que l'on procède à d'autres consultations sur ces questions.

Plusieurs thèmes intéressants sont ressortis des témoignages livrés par des particuliers et des organismes autochtones, et cela a permis aux membres du Comité de mieux comprendre la situation. Par exemple, un certain nombre de témoins ont proposé le recours à une table ronde ou à un «conseil » semblable aux modèles traditionnellement utilisés par les Autochtones, qui pourrait réunir les anciens, les grands-mères, les parents et les autres parties intéressées en vue de la prise de décisions sur les arrangements parentaux. 104 Comme Marilyn Buffalo, de la Native Women's Association of Canada, l'a recommandé :

Nous préconisons des conseils de détermination de la peine. Je dirais que cela s'appliquerait aussi au droit de la famille. Il faut ramener un peu de bon sens et le seul endroit où il y en a c'est dans la spiritualité. Les anciens devraient nous diriger. Quand on s'adresse d'abord aux anciens, il n'y a pas de problème. La grand-mère devrait participer elle aussi à ces conseils. (Réunion 37)

Art Dedam, de l'Assemblée des Premières Nations, a insisté sur l'importance critique des enfants et des familles élargies :

L'enfant est au coeur des préoccupations des familles et des collectivités des Premières Nations depuis des temps immémoriaux. L'enfant est toujours respecté. Il est considéré comme sacré car c'est sur lui que notre avenir repose. Le bien-être d'un enfant compte énormément pour les collectivités des Premières Nations. Il continue à être de coutume aujourd'hui que la famille et les membres de la collectivité contribuent à l'éducation d'un enfant. L'éducation des enfants a toujours bénéficié de l'appui de la famille élargie et il continue à en être de même aujourd'hui. La famille élargie demeure un aspect essentiel des collectivités des Premières Nations. (Réunion 37)

On a préconisé une augmentation de la recherche sur les besoins précis des collectivités autochtones en matière de droit de la famille. On a également soutenu le concept voulant que l'intérêt de l'enfant soit le principal point à considérer dans les décisions relatives aux arrangements parentaux et que les ressources mises à la disposition des familles comprennent le counselling, la médiation et les autres interventions thérapeutiques nécessaires. Les professionnels et les intervenants du secteur judiciaire devraient être

¹⁰⁴ Les conseils de détermination de la peine sont déjà utilisés pour certaines affaires de droit criminel.

renseignés sur la vie et les besoins des Autochtones, surtout lorsque la situation géographique est un facteur. On a également abordé l'importance de la disponibilité de l'aide juridique, la nécessité d'avoir des défenseurs des droits des enfants et l'importance du rôle des grands-parents.

Aux fins de l'examen de toutes ces questions, il faudra poursuivre les études et les consultations mais, au bout du compte, cela sera avantageux pour tous les Canadiens.

Recommandations

- 45. Le Comité recommande que le gouvernement fédéral poursuive ses consultations auprès des collectivités et des organisations autochtones partout au Canada sur les questions concernant le partage des responsabilités parentales qui sont particulières à ces collectivités, afin d'élaborer un plan d'action clair qui sera mis en oeuvre en temps utile.
- 46. Le Comité recommande que le gouvernement fédéral se serve, comme base pour ces consultations, des recommandations touchant le droit de la famille formulées par la Commission royale sur les peuples autochtones, et qu'il travaille à leur mise en oeuvre en fonction des besoins.

Chapitre 7 — Orientation sexuelle, minorités religieuses et ethnoculturelles et Canadiens vivant à l'étranger

Les cinq premiers chapitres du présent rapport s'adressaient à la « population générale » des couples qui divorcent et ils ont été écrits en fonction de ces couples. La race, l'ethnie, la religion et les autres caractéristiques particulières des personnes qui divorcent n'ont pas été des facteurs pris en considération dans l'analyse présentée et les recommandations présentées par le Comité. Le Comité reconnaît cependant que, dans de nombreux cas, les familles ont des caractéristiques raciales, ethniques, religieuses ou autres qui teintent leur expérience au moment d'une séparation ou d'un divorce. Il faudrait reconnaître ces caractéristiques et le système juridique devrait les prendre en considération; dans certains cas, il faudrait prévoir des options ou des réponses qui y soient adaptées. Ce chapitre examine quatre groupes identifiés par le Comité au cours de ses audiences, ainsi que les préoccupations qui ont été exprimées au sujet de ces groupes et du divorce.

A. Orientation sexuelle

Comme l'a noté Katherine Arnup, professeur d'études canadiennes, la question de l'orientation sexuelle est pertinente pour les délibérations du Comité :

[...] c'est lorsqu'il y a éclatement du couple hétérosexuel à la suite d'une révélation de lesbianisme ou d'homosexualité de la part de l'un ou des deux parents. Dans un cas pareil, il incombe aux juges d'évaluer les incidences potentielles de l'orientation sexuelle sur la situation des enfants. (Réunion 10)

Certains témoins représentant le mouvement Égale (Égalité pour les gais et les lesbiennes) ont dit au Comité que la société sous-estimait le nombre de gais et de lesbiennes qui assument un rôle de parent. Selon l'avocate Cynthia Petersen, lorsqu'ils sont appelés à rendre des décisions concernant des parents gais, les tribunaux doivent « détruire les stéréotypes ou les mythes » qui existent sur l'habilité des gais et des lesbiennes à jouer un bon rôle parental. Mme Petersen a parlé des preuves réunies dans la récente affaire ontarienne d'adoption, $Re\ K$., où l'on a longuement examiné les données empiriques des études publiées en sciences sociales et établi qu'il n'y avait pas de différence de qualité étayée entre les compétences parentales des couples hétérosexuels et celles des couples homosexuels 105.

Les témoins qui ont parlé de la responsabilité parentale dans les couples homosexuels voulaient rappeler au Comité que l'orientation sexuelle du parent ne devrait pas comme telle entrer en ligne de compte dans les décisions concernant les compétences parentales ou les arrangements parentaux. En ce qui concerne les couples homosexuels et l'exercice des responsabilités parentales, les témoins ont demandé au Comité de recommander que ces couples se voient offrir les mêmes options que les couples hétérosexuels. Le Comité estime que l'égalité des gais et des lesbiennes en droit de la famille est désormais assurée par la *Charte canadienne des droits et libertés* et qu'il n'a donc pas à présenter de recommandation particulière à cet égard. La question des options offertes aux homosexuels dépasse toutefois la portée de la présente étude, mais c'est un point qu'il faudra sûrement examiner dans l'avenir.

^{105 (1995) 23} OR (3rd) (Cour de l'Ontario (Div. prov.))

Recommandation

47. Le Comité recommande que l'orientation sexuelle ne soit pas considérée comme un élément négatif dans les décisions relatives au partage des responsabilités parentales.

B. Minorités religieuses

La Charte protège également les Canadiens de toute discrimination ou de tout traitement inéquitable attribuable à leur religion. La religion peut devenir un motif de discorde entre les parents qui se séparent ou qui divorcent, surtout lorsque la religion de l'un des parents prévoit des célébrations ou des pratiques exigeantes. La Cour suprême du Canada a été appelée à trancher deux affaires mettant en cause la liberté religieuse de parents non cohabitants 106. Malheureusement, dans les deux cas très semblables, la Cour en est arrivée à des conclusions contradictoires. Depuis, un certain nombre d'observateurs ont constaté que les décisions éclairent peu les tribunaux ou les parents pour les affaires ultérieures.

Certains groupes religieux ont critiqué le fait que l'on examine, pour la détermination de l'intérêt de l'enfant, des aspects comme la religion, auxquels il conviendrait de ne pas toucher. Étant donné que le Comité favorise le principe de l'intérêt de l'enfant, étayé par une définition dans la loi comme il a été recommandé plus haut, les membres estiment que les juges et les parents sont aptes à déterminer s'il y a un lien valide entre les pratiques religieuses et l'intérêt de l'enfant. Dans la plupart des cas, ce sont d'autres critères qui entreront davantage en ligne de compte, mais un tribunal devrait avoir la possibilité de faire intervenir les questions de religion lorsqu'il s'agit d'un facteur dont il faut tenir compte.

C. Minorités ethnoculturelles

La Charte protège les Canadiens contre toute discrimination fondée sur leur origine ethnique. L'origine ethnique, comme la religion, ne devrait pas entrer en ligne de compte dans les décisions relatives aux arrangements parentaux, au moment de la séparation ou du divorce. Il y aura évidemment des cas où les parents qui n'ont pas les mêmes origines ethnoculturelles seront en désaccord quand aux pratiques culturelles. On a par conséquent insisté auprès du Comité sur l'importance, pour les juges, les avocats et, en particulier, les professionnels de la santé mentale comme les personnes procédant aux évaluations aux fins des décisions de garde et de droit de visite, d'être dénués de tout préjugé racial ou culturel et d'être sensibles aux besoins ethnoculturels des parents et des enfants.

Comme Naïma Bendris, qui comparaissait devant le Comité à Montréal, l'a déclaré :

Le droit matrimonial reproduit, à l'endroit des femmes immigrantes, des stéréotypes et préjugés négatifs découlant des représentations sociales présentes dans les sociétés occidentales en général et dans la société canadienne en particulier. Ces femmes sont évaluées et jugées comme autres, en fonction de leur appartenance à un groupe autre et selon les images stéréotypées qu'on leur assigne et dont peuvent être imprégnés certains professionnels de la cour, notamment en ce qui concerne les femmes arabo-musulmanes dont je fais partie, puisque je suis femme arabe et musulmane. [...] Les femmes immigrantes sont évaluées selon une grille d'analyse et de lecture de l'idéologie dominante, qui ne tient pas compte de leurs référents psychologiques, sociologiques, culturels et anthropologiques. La méconnaissance qu'on a des référents culturels de ces femmes peut entraîner des biais et des travers dans les évaluations et nuire à ces femmes. Il faut, à mon avis, procéder à une adaptation culturelle de ces évaluations-là. (Réunion 16)

¹⁰⁶ Young c. Young, [1993] 4 S.C.R. 3; D.P. c. C.S. [1993] 4 S.C.R. 141.

Les témoins trouveront satisfaction à ce propos, du moins en partie, lorsque sera appliquée notre recommandation sur l'accréditation professionnelle (voir recommandation 31).

D. Canadiens vivant à l'étranger

Les familles canadiennes vivant à l'extérieur du pays constituent le dernier groupe dont les intérêts peuvent différer légèrement de ceux des familles vivant au Canada. Bon nombre de ces familles comptent au moins un membre qui travaille pour le service canadien des Affaires étrangères ou pour un employeur étranger. Selon Gar Pardy, du ministère fédéral des Affaires étrangères et du Commerce international, quelque 1,5 million de Canadiens travaillent à l'étranger ou y vivent. Cet important groupe se heurte à des complications en cas d'échec du mariage parce qu'il n'a pas accès au système judiciaire du Canada ni aux ressources qu'il offre. Dans bon nombre de cas, une partie de la famille, sinon toute la famille, retournera au Canada au moment de la séparation; certaines familles choisissent toutefois de rester et de s'adresser à l'appareil judiciaire local pour régler les arrangements parentaux.

Agnes Casselman, directrice générale de Service social international Canada, a exhorté le Comité à recommander que le Canada signe la Convention de La Haye concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants (1996). Cette convention couvre un vaste éventail de questions de droit civil liées aux arrangements parentaux après le divorce et serait très utile pour régler les différends outre-frontières.

Le gouvernement fédéral est conscient des difficultés supplémentaires que rencontrent les familles qui déménagent à l'étranger pour y vivre et y travailler, et il encourage les agents des services extérieurs et leur famille à revenir au Canada pour y prendre des arrangements au moment d'un divorce ou d'une séparation. Dans le cas des personnes qui résident à l'extérieur du Canada, la Convention de La Haye concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants pourrait s'avérer utile. Il faudrait tenir des consultations entre les gouvernements aux fins de la ratification éventuelle de ce traité, pour que les Canadiens qui vivent à l'étranger puissent bénéficier des mesures qu'il prévoit.

Recommandation

48. Le Comité recommande que le ministre des Affaires étrangères cherche à faire signer et ratifier le plus tôt possible la Convention de La Haye concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants, signée en 1996.



DEMANDE DE RÉPONSE DU GOUVERNEMENT

Conformément à l'article 109 du Règlement de la Chambre des communes, le Comité prie le gouvernement de déposer une réponse globale à ce rapport.

Une exemplaire du procès-verbal est déposé (Réunion nº 55)

Respectueusement soumis,

L'hon. Landon Pearson

Landan Rawas

Roger Gallaway

coprésidents



OPINION DISSIDENTE — LE PARTI RÉFORMISTE DU CANADA

DÉCEMBRE 1998 — « POUR L'AMOUR DES ENFANTS »

Paul Forseth, député

(New Westminster—Coquitlam—Burnaby)

Eric Lowther, député

(Calgary—Centre)

Philip Mayfield, député

(Cariboo—Chilcotin)

Les membres du Parti réformiste sont d'accord avec l'essentiel du rapport, mais ils sont profondément déçus que certaines recommandations n'aient pas été appuyées par les députés ministériels, ou qu'elle l'aient été à des degrés divers par les autres partis. Les députés réformistes ont été étroitement associés dès le départ aux travaux du Comité, et ils espèrent que le rapport contribuera à faire prendre conscience à la population de la valeur intrinsèque de la famille. Les députés réformistes sont en faveur du « partage des responsabilités parentales » en tant que droit et obligation. Il y a des problèmes dont le Comité n'a pas tenu compte dans la version définitive du rapport, en raison de l'intransigeance idéologique de certains membres du Comité, malgré les témoignages publics.

Les réformistes sont conscients de la gravité et de l'étendue du problème de la dislocation des familles au Canada. L'éclatement des familles fait du tort aux enfants et aux parents, ainsi qu'à la qualité de la société canadienne. Les nombreux divorces et les familles instables sont un problème national dont le gouvernement actuel ne s'occupe pas comme il le devrait. C'est pourquoi il nous faut un leadership politique plus dynamique, tant au niveau fédéral que provincial, d'abord pour juguler les forces sociales qui ne favorisent pas la stabilité familiale, et ensuite, pour améliorer le cadre réglementaire permettant la dissolution des familles. En outre, les besoins des enfants exigent une approche innovatrice dans le réforme du droit de la famille.

Nous n'ignorons pas que l'existence du Comité n'est pas le fait du gouvernement, mais qu'il est le résultat d'un compromis pour que le Sénat adopte les modifications proposées à la législation sur les pensions alimentaires pour enfants. Certes, aux termes de la *Loi sur le divorce* fédérale, les parents peuvent divorcer, mais ils ne divorcent pas de leurs enfants. D'autre part, l'équilibre entre les droits et devoirs des parents n'est pas assez bien défini dans la Loi. Par conséquent, compte tenu de l'inertie politique face au problème du droit de la famille au pays, le rapport du Comité recommande une réforme du caractère historique de la législation sur le divorce.

Il est reconnu que les droits et devoirs des parents ne s'éteignent pas avec la dissolution de la famille. Mais il est clair que trop souvent, le système juridique défend mal les intérêts des enfants. Avec le tollé soulevé par les nombreux cas d'enfants malheureux au Canada, une nouvelle approche qui privilégie légalement les besoins des enfants plutôt que les besoins immédiats des parents est recommandée. Des études et le consensus social montrent ce qui est l'idéal, à savoir que les enfants sont plus heureux dans une famille classique stable, entourés de l'amour d'un père et d'une mère. En cas d'éclatement de la famille, le régime parental préféré devrait être un cadre légal qui favorise des relations suivies et valables entre l'enfant et les deux parents.

Outre les recommandations du Comité, les députés réformistes recommandent ceci :

- Dans le cas des personnes auxquelles la *Loi sur le divorce* s'applique, on devrait définir plus clairement ce qu'on entend par « enfant à charge ». En ce qui concerne les régimes parentaux et les pensions alimentaires, la Loi ne devrait s'appliquer qu'aux « enfants » et non aux « jeunes adultes ». De sorte que la définition d'« enfant » au début de la *Loi* devrait être modifiée en partie comme suit : « a atteint au moins sa majorité et est à leur charge, sans pouvoir, pour cause de maladie ou d'invalidité, cesser d'être à leur charge ». Les mentions « ou pour toute autre cause » et « ou subvenir à ses propres besoins » devraient être radiées de la définition, étant donné que les tribunaux ont interprété ces termes comme comportant des obligations telles qu'ils ont créé une inégalité fondamentale entre « familles intactes » et « familles séparées ».
- Les grands-parents, tant par le sang que par adoption, ne devraient pas être tenus d'obtenir l'« autorisation du tribunal ». La seconde grande lacune du rapport du Comité est le fait de ne pas avoir recommandé de modifier le paragraphe 16(3) de la Loi sur le divorce qui prévoit : « Pour présenter une demande au titre des paragraphes (1) et (2), une personne autre qu'un époux doit obtenir l'autorisation du tribunal ». Notre recommandation reconnaît les rapports et les devoirs spéciaux que les

grands-parents peuvent avoir, dans le cadre d'un régime parental légal, avec les enfants d'un divorce. Les grands-parents ne devraient pas avoir à obtenir l'autorisation du tribunal s'il choisissent de déposer eux-mêmes une action en justice pour présenter un plan parental. Il est intéressant de noter que la nouvelle entente avec les Nisga'a de Colombie-Britannique prévoit que le gouvernement autochtone n'a pas besoin d'« autorisation » aux termes de cet article.

- Le rapport devrait souligner l'évidente incapacité historique du gouvernement fédéral à tenir compte en droit familial du problème endémique et insidieux des « fausses accusations de comportement criminel », de la « non-fiabilité des déclarations sous serment » que les avocats obtiennent de leurs clients et de l'incroyable incapacité des tribunaux à défendre les ordonnances qu'ils rendent sur les ententes de garde d'enfants et de droits de visite. Les membres réformistes du Comité souhaitaient des recommandations d'action claires sur ces points, mais ils n'ont pu en persuader le Comité. Le Comité n'a pas souscrit aux améliorations que nous avons recommandé d'apporter au *Code Criminel* en ce qui concerne les fausses accusations délibérées en matière d'abus ou de négligence et quant à la nécessité pour les « procureurs » d'appliquer plus fréquemment, en droit de la famille, certains articles du *Code criminel* : articles 131 et 132 (personnes qui trompent la justice), 135 (témoignages contradictoires), 137 (fabrication de preuve), 138 (affidavits) et 139 (entrave à la justice).
- Les normes d'éthique des barreaux et ordres d'avocats en matière de déclarations sous serment devraient être améliorées et les codes de conduite devraient être sujets à des actions judiciaires.
- Les gouvernements provinciaux devraient réviser les définitions d'« enfant vulnérable » qui figurent dans leur législation sur la protection des enfants lorsque les cas d'accusations de mauvais traitements sans fondement se multiplient.
- Dans le cas des dispositions des « lignes directrices sur les pensions alimentaires », le principe du caractère raisonnable devrait s'appliquer. Les députés réformistes voulaient une affirmation claire reconnaissant que les nouvelles règles en matière de pensions alimentaires peuvent ne pas être dans l'intérêt de l'enfant. Le Comité s'est contenté de recommander que le ministre de la Justice entreprenne le plus tôt possible un examen de toute la question. Les membres réformistes du Comité ont insisté sur l'emploi de termes non équivoques dans cette disposition, dont le principe de la « capacité de payer par rapport au besoin manifeste ».
- Les conditions des relations parent-enfant devraient être appliquées aussi rigoureusement que celles des pensions alimentaires. Légalement, obligations financières et contacts parent-enfant ne sont par liés, mais il faut reconnaître qu'il existe un lien psychologique permanent, voire un lien social. Mal respecter une ordonnance d'obligation de visite pourrait être vu comme un mauvais traitement infligé à l'enfant, et considéré comme tel lors d'une action en justice. Les parents qui perturbent leurs enfants en négligeant les obligations prévues par une ordonnance devraient être pénalisés.

L'absence d'action suite aux nombreuses plaintes auxquelles ces situations ont donné lieu depuis longtemps au pays explique en partie le profond malaise qui existe dans l'application du droit de la famille au Canada. Le remède à ces problèmes graves dans l'application de la loi passe par une initiative du gouvernement en concertation avec les provinces, les barreaux et les tribunaux. Le rapport du Comité n'insiste pas assez sur ces problèmes et ne proposent pas de solutions. C'est manifestement une question qui doit être approfondie.

Comme les pressions qui nuisent à la stabilité des familles sont souvent économiques, les députés réformistes notent dans la loi de l'impôt sur le revenu une discrimination systémique entre « familles intactes » et « familles désunies ». Les membres réformistes sont en faveur d'un système de sécurité sociale axé sur la famille ou le foyer, géré par le biais du régime fiscal. En outre, il y aurait eu lieu de noter que les règles régissant la prestation fiscale pour enfants manquent de cohérence, et qu'elles vont souvent à l'encontre d'ordonnances rendues en vertu de la loi sur le divorce.

Le recours au tribunal est souvent la dernière étape d'un processus de désintégration, lorsque les autres solutions n'ont rien donné. Malheureusement, le tribunal est un instrument mal adapté aux besoins précis et changeants des enfants pris dans un conflit parental. Il est regrettable que des parents parviennent à manipuler la justice au cours d'une action en divorce, car c'est toute la communauté qui en souffre.

Il convient donc de souligner que les témoignages entendus par le Comité ont insisté sur la nécessité de mettre l'accent sur la responsabilisation accrue des parents et l'éducation familiale et de mettre en place d'autres services de règlement des différends à l'amiable. Il existe un énorme besoin d'une gamme de services sociaux préventifs et correctifs, ainsi que d'un engagement renouvelé de la part des intervenants d'exiger une réforme rapide des services existants. Lorsque les choses vont mal dans une famille, le rôle du gouvernement est d'assurer aux parents et enfants l'accès à des services d'aide abordables.

OPINION DISSIDENTE DU BLOC QUÉBÉCOIS AU RAPPORT DU COMITÉ MIXTE SPÉCIAL SUR LA GARDE

ET LE DROIT DE VISITE DES ENFANTS

L'étude menée par le Comité mixte touche des problèmes très contemporains et en constante évolution. Le nombre croissant de divorces, d'enfants nés hors mariage entraînent la famille et, par le fait même, les enfants dans une dynamique nouvelle et complexe. À notre avis, ce Comité n'était pas le forum approprié pour trouver des solutions législatives à des problèmes sociaux qui touchent un nombre de plus en plus grand de nos concitoyennes et concitoyens. Les séances du Comité, particulièrement au moment de l'ébauche du rapport, ont pourtant contribué à mettre en évidence une situation paradoxale, à savoir une dichotomie injustifiable aujourd'hui en terme de juridiction entre les provinces et le gouvernement fédéral en ce domaine.

En effet, toutes les questions relatives à la famille, à l'éducation et aux services sociaux relèvent clairement des compétences des provinces, de même que tout ce qui touche les questions de séparation de corps. Au Québec, ce sont les articles 493 et suivants du Code civil du Québec qui traitent de la séparation de corps. Par ailleurs, le divorce est de juridiction fédérale en vertu de la Constitution. La très grande majorité des cas de divorce se règlent en dehors des tribunaux. Dans la plupart de ces cas, c'est au moment de la séparation de corps qu'interviennent les ententes relatives au droit de garde et de visite des enfants. La séparation de corps étant de compétence provinciale, il serait logique que la législation sur le divorce le soit également.

Ainsi nous recommandons que la *Loi sur le divorce* soit abrogée et que la compétence en matière de divorce soit transférée aux provinces.

Il serait également logique d'abroger la *Loi sur le mariage* et de transférer cette compétence aux provinces. En effet, la célébration du mariage de même que le partage des biens, les effets civils du mariage, la filiation, relèvent exclusivement de la compétence des provinces alors que les conditions de fond (capacité de contracter un mariage et empêchements au mariage) sont de compétence fédérale. Par exemple au Québec, c'est le gouvernement du Québec qui a légiféré pour permettre les mariages civils. Selon nous, voilà un autre exemple de partage de compétence inutile et désuet. Il serait beaucoup plus simple que l'ensemble du droit de la famille relève d'une seule et même compétence, celle des provinces. À ce propos, nous nous devons de citer l'Honorable sénateur Gérald-A. Beaudoin qui, en 1990, écrivait que :

« On peut se demander pourquoi le constituant en 1867 a octroyé au Parlement une compétence exclusive sur le mariage et le divorce. Il semble bien que ce soit pour des motifs religieux. Aux termes de l'article 185 du Code civil du Bas-Canada, le mariage ne pouvait se dissoudre que par la mort naturelle d'un des époux. Ce principe était accepté par l'immense majorité des Québécois composée de catholiques; les protestants voulaient au contraire que le Parlement canadien puisse légiférer sur le divorce. D'où l'édit de l'article 91.26 de la Loi constitutionnelle de 1867 qui donne une compétence exclusive au Parlement fédéral sur le mariage et le divorce. » (Beaudoin, Gérald-A., La constitution du Canada, Institutions, partages des pouvoirs, Droits et libertés, Montréal 1990, éditions Wilson et Lafleur 1990, p. 360).

Or, ce qui était indiqué en 1867 ne l'est plus aujourd'hui. La question religieuse n'ayant plus la même importance, il importe que nos lois reflètent la réalité. Notre recommandation ferait en sorte que les provinces pourraient avoir entière juridiction sur leur droit familial et légiférer dans ce domaine selon leur propre réalité sociale.

Nous nous permettons de citer encore une fois l'Honorable sénateur Beaudoin :

« Se pose alors la question de savoir si le domaine du mariage et du divorce ne devrait pas être remis aux provinces, permettant ainsi au Québec d'avoir un contrôle plus absolu sur son droit familial qui constitue une partie importante de son droit privé qui diffère de celui des autres provinces.

Certains auteurs croient qu'il y aurait avantage à laisser cette compétence à l'article 91. Ils trouvent paradoxal que l'on veuille décentraliser en ce domaine alors que les États-Unis semblent vouloir aller dans le sens de la centralisation et de l'uniformité des lois du divorce. Ils

oublient peut-être que nous avons deux systèmes de droit au Canada et que les arguments qu'ils invoquent à l'appui de leur thèse perdent un peu de leur force dans une fédération hétérogène comme le Canada. » (Ibid., p. 366)

Dès la création du Comité, il nous est apparu évident que des problèmes d'ordre juridictionnel seraient omniprésents. Rappelons ici le mandat de ce Comité :

« Que soit formé un Comité mixte spécial du Sénat et de la Chambre des communes chargé d'examiner et d'analyser les questions des ententes concernant la garde, les droits de visite et l'éducation des enfants après la séparation ou le divorce des parents. Plus particulièrement, que le Comité soit chargé d'évaluer le besoin d'une approche davantage centrée sur les enfants dans l'élaboration des politiques et des pratiques du gouvernement en droit de la famille, c'est-à-dire une approche qui mette l'accent sur les responsabilités de chaque parent et sur le besoin des enfants et leur meilleur intérêt, au moment de la conclusion des ententes concernant l'éducation des enfants. »

Nous avons participé à ce Comité parce que le sujet est très sérieux et important dans notre société et ce, particulièrement pour les personnes qui vivent des difficultés dans le processus d'un divorce ou d'une séparation de corps, mais ce n'est pas au gouvernement fédéral de légiférer en ce domaine, cela revient aux provinces. Qu'il suffise de comparer les provinces dans leur manière de traiter la politique familiale pour comprendre les différences significatives qui existent. Ainsi au Québec, notre droit civil fait en sorte que notre vision du droit de la famille diffère de celle du reste du Canada : rappelons le long débat qui a eu cours au Comité concernant la notion de meilleur intérêt de l'enfant, notion déjà inscrite dans le Code civil du Québec depuis plusieurs années.

Les parents et les enfants seraient donc beaucoup mieux servis par un droit familial entièrement sous la responsabilité des provinces.

Nonobstant notre position, il nous apparaît par contre important de souligner certains éléments :

- 1. Compte tenu que la grande majorité des cas de garde et de droit de visite se règlent à l'amiable, nous émettons de sérieuses réserves quant à la nécessité de légiférer pour contrôler l'ensemble des cas.
- 2. Il faut respecter les droits fondamentaux de tout individu, notamment leur droit à la vie privée.
- 3. Nous reconnaissons le principe du meilleur intérêt de l'enfant. En ce sens, l'enfant ne doit pas être victime des conflits de ses parents et il ne faut pas confondre son intérêt avec celui de ses parents ou de sa famille élargie.
- 4. La violence familiale existe et le danger est accru pour ses victimes lors de la séparation. La sécurité des enfants et de leurs parents doit donc être assurée. La grande majorité des études et des statistiques démontrent que ce sont les femmes qui sont le plus victimes de la violence familiale. Compte tenu de l'extrême difficulté à mettre au grand jour les situations de violence, nous nous questionnons sur la nécessité de référer à la violence « prouvée » (voir recommandation 16.11).
- 5. Les tribunaux ont la responsabilité de résoudre les cas conflictuels.
- 6. La très vaste majorité des parents veulent sincèrement le bien-être de leurs enfants : ils ne sont pas des bandits de grand chemin. Le recours aux sanctions, à la coercition et la rigidité excessive des obligations parentales ne nous apparaissent pas être des attitudes aidantes dans un processus qui, même dans les meilleures conditions, est toujours un processus difficile.
- 7. Bien que plusieurs témoins aient fait état de cas de fausses accusations de mauvais traitements, il importe de rappeler que le *Code criminel* prévoit déjà des dispositions sur le parjure. Avant de légiférer sur cette question, il est essentiel que des recherches visant à faire la lumière sur ces situations soient menées.

8. Alors que le Comité aurait dû mettre l'emphase sur les responsabilités parentales, nous devons reconnaître qu'il s'est plutôt transformé en guerre des sexes. La polarisation du sujet entre les pères et les mères est regrettable tout autant que la remise en question, par certains, des acquis des femmes, obtenus pourtant de longue lutte.

En résumé, voici la position du BQ sur les recommandations apparaissant dans le rapport :

Nous sommes contre les recommandations suivantes : 10, 19, 22, 23, 25, 26, 30, 43.

Nous sommes pour les recommandations suivantes: 1, 2, 15, 17, 37, 41, 42, 45, 47, 48.

Nous sommes partiellement en désaccord avec les recommandations suivantes : 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 20, 21, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 44.

REMERCIEMENTS

Nous tenons à remercier tout le personnel du Comité pour la qualité de leur travail, spécialement les deux attachés de recherche Kristen Douglas et Ron Stewart, ainsi que les greffiers Catherine Piccinin et Richard Rumas. Nous tenons à remercier également toutes les personnes et tous les groupes qui ont pris de leur temps pour nous faire part de leurs points de vue. Enfin, nous adressons un remerciement particulier à madame Landon Pearson pour sa patience et ses efforts à assurer le bien-être des enfants.

Madeleine Dalphond-Guiral, députée de Laval-Centre

Caroline St-Hilaire, députée de Longueuil

LA GARDE ET LE DROIT DE VISITE DES ENFANTS : POUR L'AMOUR DES ENFANTS

OPINION DISSENTE DU NOUVEAU PARTI DÉMOCRATIQUE

Présenté par Peter Mancini, député de Sydney-Victoria

La réaction de la population canadienne au Comité mixte spécial sur la garde et le droit de visite des enfants a été remarquable. Le NPD est reconnaissant aux nombreuses personnes et organisations qui n'ont ménagé ni leur temps ni leurs efforts pour se faire entendre. Les contributions, les conseils et les remarques qu'elles ont fournis constituent une importante documentation qui servira à faire modifier la loi actuelle et qui témoigne clairement d'un sentiment d'obligation de veiller avant tout à l'intérêt des enfants.

Le NPD tient absolument à ce que l'intérêt de l'enfant soit le facteur déterminant dans toutes les décisions prises en matière de garde et de droit de visite.

La population canadienne veut un processus juste et équitable pour traiter les questions très douloureuses et épineuses de garde et de droit de visite des enfants dans les cas de divorce. Elle veut que le gouvernement se montre proactif afin que le système protège l'intérêt supérieur et assure la sécurité des enfants et des parents.

Le Comité a voulu avant tout élaborer un cadre pour que le système veille à l'intérêt de l'enfant, et les Canadiens et les Canadiennes nous ont à maintes reprises parlé des échecs de ce système et de son incapacité de répondre aux besoins des enfants et des parents. Le Comité a abordé de nombreuses questions difficiles, et le rapport témoigne des progrès marqués et contient nombre de recommandations qu'appuie le NPD.

Il reste cependant certains sujets auxquels, selon le NPD, le Comité ne s'est pas assez attardé.

Processus

Le processus qu'a suivi le Comité pour entendre et recueillir des témoignages comportait certaines lacunes.

Selon le NPD, le Comité devait absolument, pour faire le tour des graves questions dont il était saisi, garantir également à tous les Canadiens intéressés l'accès à ses séances afin de présenter leurs vues. Pour ce faire, le Comité aurait dû s'éloigner des centres urbains pour entendre les préoccupations propres aux collectivités rurales. Nous sommes conscients des différences dans la nature et la qualité des services offerts dans les régions rurales du Canada, par opposition à ceux offerts dans les villes.

Le Comité aurait voulu se rendre dans les collectivités rurales, mais le Parlement n'a pas dégagé les fonds nécessaires aux déplacements dans ces région, de sorte que le rapport ne présente pas le point de vue rural.

D'autres préoccupations touchant le processus :

- L'avis insuffisant donné au public, de sorte que tous les intéressés n'ont pas pu comparaître.
- Le préjugé apparent de certains membres du Comité.
- Le manque de respect et de courtoisie de la part de certains membres du Comité à l'égard de témoins.

Ces préoccupations font malheureusement ombre au tableau, assombrissant la qualité du produit final et l'excellent travail du dévoué personnel du Comité. Les greffiers, les attachés de recherche et le personnel ont travaillé sans relâche, faisant preuve d'un degré élevé de professionnalisme et d'un soutien précieux et indéfectible, sans lesquels le rapport n'aurait pas pu exister.

Pauvreté

Le rapport n'aborde pas la question de la pauvreté des enfants, malgré la gravité du problème. Or la pauvreté des enfants au Canada a augment de 60 p. 100 depuis 1989, et cette année 26 000 enfants de plus que l'an dernier vivent dans la pauvreté.

Un débat sur une approche axée sur les enfants ne saurait passer cette question sous silence.

Le NPD recommande:

- Que tous les paliers de gouvernement se penchent sur la pauvreté, puisqu'elle contribue à la violence familiale et à l'éclatement de la famille.
- Que le gouvernement fédéral respecte son engagement et mette fin à la pauvreté chez les enfants.
- Que le gouvernement fédéral reconnaisse que tant et aussi longtemps que les parents qui ont la garde des enfants seront poussés vers la pauvreté, la société estimera normal que les enfants d'un divorce soient pénalisés par le processus, particulièrement dans les familles à faible revenu.

Violence familiale

Le rapport reconnaît que la violence familiale n'est pas compatible avec l'intérêt de l'enfant et que, dans les cas où il y a des antécédents de violence, l'accès et la garde partagés ne sont peut-être pas avantageux ou dans l'intérêt de l'enfant. Dans ces cas, les parents ne devraient pas être obligés de recourir à la médiation. Le rapport indique clairement que les antécédents de violence doivent constituer un facteur déterminant lorsque l'on veut assurer l'intérêt supérieur de l'enfant.

De nombreux groupes et particuliers qui ont comparu ont exprimé de graves préoccupations concernant l'incidence sur les enfants de la violence familiale, particulièrement quand elle vise les femmes.

Les femmes sont les principales victimes de la violence familiale et elles craignent pour leur vie quand elles quittent une relation destructrice. De plus, les enfants qui sont témoins de cette violence en restent marqués.

Le NPD recommande:

- Que le gouvernement fédéral prenne des initiatives pour mettre fin à la violence familiale, dont les victimes sont des femmes et des enfants.
- Que la sécurité des parents et des enfants soit considérée une priorité quand des décisions sont prises concernant la garde et le droit de visite et les échanges et les visites sous surveillance.
- Que la loi habilite les tribunaux à obliger les auteurs d'actes de violence familiale à suivre des séances de counselling ou de traitement s'ils veulent avoir la garde ou des droits de visite des enfants.

Que le critère appliqué pour déterminer s'il y a preuve de violence soit tiré du droit civil, c'est-à-dire la « prépondérance des probabilités », et non du droit pénal, qui exige une preuve « hors de tout doute raisonnable ».

Accès à l'information

Le Comité fait retomber le fardeau de la preuve sur les professionnels et leur demandent de communiquer les renseignements demandés par le père ou la mère au sujet de l'enfant, à moins d'indication contraire. Nous nous opposons à ce que les enseignants, les médecins et les autres professionnels héritent d'un plus lourd fardeau en ce qui concerne la communication aux parents d'information touchant les enfants, particulièrement dans les cas de divorces hautement conflictuels.

Le NPD recommande:

• Que tout plan parental doive préciser que chaque parent a droit aux renseignements pertinents médicaux, scolaires et autres concernant l'enfant. Le tribunal doit présumer que ces renseignements seront partagés et, dans le cas contraire, des raisons devront être fournies. Si le tribunal ne prévoit pas d'office le partage des renseignements, l'entente ou l'ordonnance doit indiquer clairement quels renseignements seront communiqués au père ou à la mère. Ces ordonnances serviront ainsi aux personnes qui doivent divulguer ces renseignements.

Exécution du droit de garde et de visite

Le non-respect des ordonnances et l'incapacité ou le refus d'agir de la cour ont été la principale cause de colère et de frustration chez bon nombre des témoins ou des auteurs de mémoires. La question a donné lieu à des témoignages déchirants, principalement de la part de parents séparés de leurs enfants depuis des années, ce qui a mis en lumière les difficultés qu'éprouve le système judiciaire à assurer l'exécution des droits de visite.

Bon nombre ont aussi fait valoir la position extrêmement difficile des parents qui ont la garde mais doivent respecter des droits de visite qui ne sont pas dans l'intérêt de l'enfant.

Les principales sources de frustration pour les parents dans les différends touchant le droit de visite découlent du système juridique : pénurie d'avocats, retards dans les dates de comparution pour les audiences d'exécution, coût des comparutions en cour pour faire exécuter un droit de visite, tous ces facteurs contribuent aux sentiments de frustration et d'impuissance que vivent les parents aux prises avec le système.

Les parents qui doivent souvent attendre une audience pendant des mois, sont privés pendant ce temps de leur droit et sont pénalisés du fait qu'ils ont recours aux tribunaux pour éviter des conflits.

Il y a un urgent besoin de programmes d'aide juridique améliorés. Il faut aussi offrir des avocats aux honoraires abordables et accélérer le processus judiciaire.

Le NPD recommande:

- Que l'on reconnaisse l'importance d'une aide juridique réellement accessible et que des fonds fédéraux et provinciaux soient dégagés pour rendre les services d'aide juridique au civil plus facilement disponibles.
- Que des ressources soient affectés pour que l'on règle rapidement les causes de droits de visite non respectés.

ANNEXE I Liste des témoins

Associations et particuliers	Date
Ministère de la Justice	Le mercredi 11 février1998
Marilyn Bongard, conseillère juridique, Section de la famille, des enfants et des adolescents	De morereur II teviter 1770
Thea Herman, sous-ministre adjoint principal, Politique	
George Thomson, sous-ministre de la Justice et sous-procureur général	
Ministère de la Justice	Le lundi 16 février 1998
Marilyn Bongard, conseillère juridique, Section de la famille, des enfants et des adolescents	
Carolina Gilberti, chef intérimaire, Équipe sur les pensions alimentaires pour enfants	
Thea Herman, sous-ministre adjoint principal, Politique	
Jim Sturrock, agent de recherche, Secteur des politiques	
Barreau du Québec	Le mercredi 18 février 1998
Roger Garneau, membre du Comité	
Dominique Goubau, professeur, Université Laval, Faculté de droit et membre du Comité	
Miriam Grassby, présidente du Comité du Barreau sur le droit de la famille	
Suzanne Vadboncoeur, directrice du Service de recherche et de législation et secrétaire du Comité du Barreau sur le droit de la famille	
Université Queen	Le mercredi 25 février 1998
Nicholas Bala, professeur, Faculté de droit	
« Fathers Are Capable Too (FACT) »	Le mercredi 11 mars 1998
Malcolm Mansfield, président	
Deborah Powell, porte-parole auprès des médias	
« National Shared Parenting Association »	
Danny Guspie, directeur exécutif	
Heidi Nabert, directrice	
Association nationale de la femme et du droit	Le lundi 16 mars 1998
Carole Curtis, membre d'un groupe de travail sur le droit de la famille, membre de l'ordre des avocats	
Judy Poulin, membre de SCOPE	
Comité canadien d'action sur le statut de la femme	
Cori Kalinowski, membre, Comité de la justice	
Conseil national des femmes du Canada	
Ruth Brown, ancienne présidente	
Helen Saravanamutoo, vice-présidente	

Associations et particuliers

Date

YWCA du Canada

Sally Bryant Ballingall, ancienne présidente

Elaine Teofilovici, chef de la direction

« Association to Reunite Grandparents and Families »

Irma Luyken, présidente

« Canadian Grandparents' Rights Association,

Ottawa »

Madelaine Bremner, présidente

Patricia Moreau, membre

Grandparents Requérant Accès et Dignité (GRAND)

Ottawa

Liliane George, présidente

Jeanette Mather, membre honoraire

Égale

John Fisher

Nelligan, Power

Pam MacEachern, avocat

« Pauline Jewett Institute on Women's Studies »

Katherine Arnup, directrice et professeur de l'association, School of Canadian Studies

Sack Goldblatt

Cynthia Peterson

À titre personnel

Philip MacAdam

À titre personnel

Barbara Landau

Bernice Shaposnick

Philip Shaposnick

Université Queen

Martha Bailey, professeur, Faculté de droit

Université de Toronto

Howard Irving, professeur, Faculté de travail social

Association canadienne des individus retraités

Judy Cutler, directrice des relations publiques de l'Association

Carol Libman, directrice des relations publiques

Bastedo, Stewart et Smith

Bryan Smith

Bureau d'assistance à l'enfance et à la famille

Judy Finlay, intervenante en chef

Leslie Hinkson, agente d'intervention

Le mercredi 18 mars 1998

Le lundi 23 mars 1998

Le mercredi 25 mars 1998

Le lundi 30 mars 1998

Bureau de l'avocat des enfants

Willson A. McTavish, avocat des enfants

Dena Moyal, directrice juridique, Département du droit personnel

Lorraine Martin, coordonnatrice, Clinique de travailleurs sociaux

« Clark Institute of Psychiatry »

Eric Hood, coordinateur, Éducation co-op

« DADS Canada »

Pauline Green, conseillère

Stacy Robb, président

« Easton Alliance for the Prevention of Family

Violence »

Stephen Easton, directeur et administrateur

Hugh Graham, directeur, Communications électroniques

« Fairness in Family Law »

Yvonne Choquette

James Hodgins, directeur exécutif

« Grandparents Raising Grandchildren » et de la

Société grand-parents requérant accès et

dignité (GRAND)

Joan Brooks, fondatrice

Guvatt & Gaasenbeek

Richard Gaasenbeek

« Helping Unite Grandparents and Grandchildren »

Linda Casey, fondatrice

« Hincks Centre for Children's Mental Health »

Elsa Broder

« Human Equality Action & Resource Team »

Butch Windsor, président

Justice pour les enfants

Dale Kerton

« Mississauga Children's Rights »

Grant Wilson, président

Régime d'aide juridique de l'Ontario

Robert Holden, directeur provincial

Keith Wilkins, coordonnateur, Services au client

À titre personnel

Sharman Bondy

Eugene Colosimo

Darlene Ceci-Laws

Michael Day

Le mardi 31 mars 1998

Reisa Eisen

Bruce Haines

Kevin Laws

Howard Waiser

Simon Wauchop

W. Glen Howe & Associates

John Burns

Glen Howe

« Assaulted Women's Helpline »

Beth Bennet, directrice de programme

Leslie Sheridan-Silver

Association des travailleuses et travailleurs sociaux de

l'Ontario

Barbara A. Chisholm, consultante en services à l'enfant et à la famille

Gillian McCloskey, directrice exécutive associée

« Balance Beam »

Tony Vorsteveld, facilitateur

« Coalition of Canadian Men's Organizations »

J. Kirby Inwood

« Equal Parents of Canada »

Eric D. Tarkington

« Families Against Deadbeats »

Renate Diorio, fondatrice

Ilene McGillis, membre

« Fathers for Justice »

Rick Morrison, président

Guides du Canada

Elaine Paterson, commisssaire nationale

Margaret Treloar, présidente élue

À titre personnel

Michael Cochrane

Wendy Dennis

Patrick Ellis

Walter Fox

Stan E. Gal

Frank Heutehaus

Greg Kershaw

Saro Kumar-McKenna

Sheila Kumar-McKenna

Trevor Lynch

Cynthia Marchildon

Marty McKay

Peter Meier

Deborah L. Merklinger

Phil Pocock

John Vander Kooij

« In Search for Justice »

Ross Virgin, président

« Kids Need Both Parents »

Wayne Allen, directeur

« Ontario Association of Interval and Transition Houses »

Ruth Hislop, vice-présidente

Eileen Morrow, commissaire nationale

« Second Spouses of Canada»

Dori Gospodaric, co-président

« Stepfamilies of Canada »

Nardina Grande, présidente

« Canadians for Organizational and Personal

Accountability »

Dorian Baxter

« Central Toronto Youth Services Research and

Program »

Fred Matthews, psychologue et directeur

« Children's Voice »

G. (Bill) Flores

« Community Coalition for Custody and Access »

Rita Benson, membre

Keith Marlowe, membre

Sylvia Pivko, directrice générale, Clinique du tribunal de la famille

« Family Conflict Resolution Services »

Vernon Beck, directeur de programme

« London Coordinating Committee to End Woman Abuse »

Margaret Buist, avocate, droit de la famille

Bina Ostoff, conseillère intervenante, London Battered

Women Advisory Centre

Jan Richardson, directeur général, Women's Community

« London Custody and Access Project »

Marlies Suderman

« Non-Custodial Parents of Durham »

Ted Eye

Le mercredi 1^{er} avril 1998

Ted Greenfield

« Real Women »

Gwendolyn Landolt, vice-présidente nationale

Lorraine McNamara, secrétaire nationale

À titre personnel

Usha Ahlawat

Amy Beck

Barry Demeter

Jane King

Tracy London

Alexandra Raphael

Anne Ross Demeter

Association GRAND de Montréal

Mathilde Erlich-Goldberg, présidente

Michel Girard, avocat

Albert Goldberg, vice-président

Association lien pères enfants de Québec

Gilbert Claes

Laurent Prévost

Rock Turcotte

Fédération des associations de familles monoparentales et recomposées du Québec

Sylvie Levesque, directrice générale

Claudette Maingué, agent de développement

Groupes d'action des pères pour le maintien des liens familiaux

Norman Levasseur, président

Pères séparés inc.

Sylvain Camus

Regroupement des familles monoparentales et recomposées de Laval

Agathe Maheu

À titre personnel

Jacques Boucher

Annie Brazeau

Pierre Chapdelaine

Joel Duchoeny

François Gadoury

Besime Kalaba

Ian Solloway

Nicholas Spencer-Lewin

Robert Spicer

Le jeudi 2 avril 1998

Associations et particuliers

Date

Joy Sporin

« F.E.D.-U.P. »

Harry Braunschweiller, membre

Tony Drufovka, membre

William Levy, président

Goldwater, Dubé

Anne France Goldwater, avocate, Droit familial

Groupe d'entraide aux pères et de soutien à

l'enfant

Claude Lachaine, directeur

Ghislain Prud'homme, directeur

« Montreal Men Against Sexism »

Martin Dufresne

« Nemesis Network »

Elizabeth Cook

Ordre professionnel des travailleurs sociaux du

Québec

Claudette Guilmaine, travailleuse sociale, médiatrice familiale

Organisation pour la sauvegarde des droits des

enfants

Riccardo Di Done, président fondateur

Angela Ficca, avocate

« Parental Alienation Information »

Pamela Stuart-Mills

À titre personnel

Naïma Bendris

Jacques Gurvits

Cerise Morris

Janice Outcalt

Université du Québec à Hull, Département de travail social

Denyse Côté

Université McGill, Département d'orientation en

éducation »

Glenn Cartwright, professeur

Despina Vassilion

« Families in Transition »

Ester Birenzweig

Rhonda Freeman, directrice

À titre personnel

Ruth Pickering

Clinique du tribunal de la famille de London

Le mercredi 22 avril 1998

Le lundi 20 avril 1998

Le vendredi 3 avril 1998

Le lundi 27 avril 1998

Gary Austin

Hôpital Royal d'Ottawa

Paul Carrier, travailleur social

Société canadienne de psychologie

John Service, psychologue, directeur général

À titre personnel

Barbara Jo Fidler

« Act II Safe Choice Program »

Connie Chapman, coordonnatrice du programme

« B.C. Men's Resource Centre »

William Taylor Hnidan, directeur

« B.C. Yukon Society of Transition Houses »

Helen Dempster, coordonnatrice, Services aux enfants

« Canadian Grandparents Rights Association »

Nancy Woolridge

« Children's Advocate »

Joyce Preston, intercesseur pour les enfants

« Dick Freeman Society »

Ken Wiehe

État de Washington, É.-U.

John Dunne, psychiatre

Diane Lye, attachée de recherche, Cour suprême de Washington

Eugene Oliver, Oliver and Associates

« Family Service of Greater Vancouver »

Jasmine Lothien

« Father's Rights Action Group »

Joseph Maiello, représentant

« Grandparents Raising Grandchildren of B.C. »

Marilyn Stevens, présidente et fondatrice

« Men Supporting Men »

Tony McIntyre

À titre personnel

Erik Austin

Debbie Beach

Tana Dineen

Ian Gillespie

Christopher Gratton-Mathiesen

Daphne Jennings

Doug Reid

Associations et particuliers

Date

« Vancouver Coordinating Committee »

Laraine Stuart

Ruth Lea Taylor

« Vancouver Men »

Carey Linde

« Victoria Men's Centre »

Moray Benoît, directeur

Harvey Maser, président

« West Coast L.E.A.F. Association »

Shelley Chrest, membre, présidente, Comité du droit et du gouvernement

« Women in Action »

Angie Lee, membre

Colleen Varco, membre

« YWCA Munroe House »

Kelley Chelsey, intervenante de la maison de transition

« Alberta Federation of Women United for Families »

Hermina Dykxhoorn, directrice exécutive

« Calgary Adhoc Committee on Children's Rights »

Dale Hensley, avocat

« Calgary Status of Women Action Committee »

Laurie Anderson, membre du conseil d'administration

Julie Black, coordonnatrice

« Canadian Grandparents Rights Association », section d'Alberta

Florence Knight, présidente

« Child Find Alberta »

Max Blitt, ancien président

Alex Weir, gérant régional

« Children's Advocate »

Mike Day, intercesseur pour les enfants

Sherry Wheeler, intercesseur pour les enfants

« Divorced Parents Resources »

Sean Cummings

« Edmonton and Northern Custody and Mediation

Program »

Kent Taylor, médiateur et coordonnateur

« Equitable Child Maintenance and Access Society », section de Calgary

Michael A. LaBerge, président

Marina L. Forbister, ancienne président

Le mercredi 29 avril 1998

« Equitable Child Maintenance and Access Society », section d'Edmonton

Brian St. Germaine, vice-président

Carolyn Van Ee, présidente

« Family of Men »

Earl Silverman

« Fathers for Fair Treatment »

David Merrell, directeur

Gouvernement de l'Alberta

John Booth, avocat, Droit familial

Institut canadien de recherche sur le droit et la

famille

Joe Hornick, directeur exécutif

Janet Walker, professeur, directrice

« Men's Education Network »

Jay Charland, porte-parole

« Men's Educational Support Association »

Paul Miller, membre

Gus Sleiman, président

« Orphaned Grandparents Association »

Annette Bruce, présidente

À titre personnel

Babatunde Agbi

Herbert Allard

Roy Buksa

Byrnece G. Cortens

Kim Cummins

Tony Hall

Gwen Hunter

Rob Huston

Stephen Jones

Gary J. Kneier

Kathy Thunderchild

Joern H.R. Witte

« Children's Advocate »

John Brand

Deborah Parker Loewen

« Merchant Law Group »

Tony Merchant, c.r.

Evatt Merchant

Le jeudi 30 avril 1998

« National Shared Parenting Association »

Leonard D. Andychuk

« Provincial Association of Transition Houses of

Saskatchewan »

Virginia M. Fisher, coordinatrice

« Saskatchewan Action Committee Status of Women »

Lynnane Beck

Jeannette Gilskuskie

Kripa Sekhar, coordonnatrice exécutive

« Saskatchewan Association of Social Workers »

Sheila Brandick

Tom Galluson

« Saskatchewan Battered Women's Advocacy

Network »

Julie Johnson

À titre personnel

Larry Birkbeck

George Charpentier

Yvonne Choquette

Jack Christopher

Kelly Grymaloski

Douglas R. Johnston

Betty Junior

Randy Liberet

Gordon Mertler

Wayne Morsky

George Seitz

Larry Shaak

Eldon Szeles

Murray Valiaho

« GRAND Society », section du Manitoba

Eileen Britton, présidente

« Manitoba Association of Women's Shelters »

Waultraud Grieger, directrice exécutive

« Men's Equalization Inc. »

Roger Woloshyn, président

« New Vocal Man Inc. »

Joyce Owens, secrétaire

« Parents Helping Parents »

Louise Malenfant

Le vendredi 1er mai 1998

« Psychology Associates »

Rosalind Golfman, psychologue clinicienne

À titre personnel

Kris Anderson

Richard A. Boer

Brent R. Burns

Micheal Catling

Duncan Croll

Rowena Fisher

Dave Goldhawk

Kathleen Harvey

David Hems

Ginette Lemoine

Ross Mackay

Dennis McKenzie

Thomas Plesh

Ellana Ronald

Keith Scott

Reena Sommer

Murray Steele

Wayne Unger

Brian Vroomen

Université du Manitoba et du tribunal de la violence familiale

Jane Ursel, Département de psychologie

« Wilder, Wilder and Langtry »

Susan Baragar

Association du Barreau canadien

John D.V. Hoyles, directeur général

Heather McKay, présidente, Section du droit de la famille

Ruth Mesbur

Eugene Raponi, trésorier, Section du droit de la famille

Association canadienne des chefs de police

Vincent Westwick, membre du Comité de modifications aux lois et conseiller juridique

Bureau d'enregistrement des enfants disparus (GRC)

John Oliver

Ministère des Affaires étrangères et du Commerce international

Gar Pardy, affaires consulaires

Le lundi 4 mai 1998

Le mercredi 6 mai 1998

Associations et particuliers

Date

Ministère du Procureur général d l'Ontario

Sally Bleeker, coordonnatrice, Programme d'accès supervisé d'Ottawa

Joan Gullen, coordonnatrice, Programme d'accès supervisé d'Ottawa

Judy Newman, coordonnatrice, Programme d'accès supervisé

Lise Parent, bénévole

Service social international

Agnes Casselman, directrice générale

Société d'aide à l'enfance d'Ottawa-Carleton

Shauna Lloyd

Heidi Polowin

Michael Pranschke

Coalition canadienne des droits de l'enfance

Tara Collins

Fernande Meilleur, présidente

Ligue canadienne pour la protection de l'enfance

Mel Gill, membre du conseil d'administration

À titre personnel

Jeffery Wilson

Médiation familiale Canada

Michael Guravich, président

Orysia Kostiuk

Services à la famille Canada

Maggie Fietz, directrice exécutive

Kathleen Stephenson, attachée de recherche

À titre personnel

Jeanne Byron

Diana Carr

Margaret Decorte

Université du Michigan

Thomas B. Darnton, professeur, Clinique juridique de défense des enfants, Faculté de droit

« Washtenaw County, Michigan »

John Kirkendall, juge

« Aboriginal Head-Start (Pre-School) »

Murline Browning, directrice exécutive

« Adhoc Committee on Custody and Access »

Susan Boyd

Le lundi 11 mai 1998

Le mercredi 13 mai 1998

Le mardi 19 mai 1998

« Battered Women's Support Services »

Fatima Jaffer, coordonnatrice à l'information

Veenu Saini, coordonnatrice, Programme de parrainage juridique

« Family Forum »

John Barson, directeur exécutif

« Fathers for Equality »

David A. Campbell

« Kamloops Women's Resource Centre »

Sheila Smith, coordonnateur

« Mom's House Dad's House »

Katherine McNeil, consultante en matière de droit de garde des enfants

« Moir Associates »

Donald Moir, avocat, Droit de la famille

« Parents of Broken Families »

Brian Grieg, vice-président

Dave Hodgson, président

À titre personnel

Marie Abdelmalik

Lori Campbell

Christopher Cole

Robert Alan Cottingham

Nicole Deagan

Colleen G. Murphy

Peter J. Ostrowski

Jeffrey Patterson

Laurie Payne

Georgina Taylor

Charles Traynor

Jennifer Wade

Université de la Colombie-Britannique

Donald Dutton, professeur de psychologie

Edward Kruk, professeur de travail social

Université Simon Fraser

Barry Beyerstein, psychologue

« Vancouver Custody and Access Support and

Advocacy Association »

Ajax Quinby

« Yew Transition House »

Sheryl Burns, conseillère pour femmes

Associations et particuliers

Date

« YWCA Children Who Witness Abuse Program »

Mark Stevens, coordonnateur

« Canadian Male Survivors of Child Abuse Resource Centre »

Le mercredi 20 mai 1998

Guy L'Heureux, fondateur

« Children's and Parents Equality Society »

George Moss, fondateur

Conseil régional métis -Zone 4 de la nation métis de

l'Alberta

Brian Fayant, président

« Mediation and Family Court Services »

Mary Jane Klein, médiatrice

« Men's Equal Access Society »

Michael McGill, membre

Milner Fenerty

Gerald Chipeur, avocat

À titre personnel

Christopher Brooks

Elsie Cable

Russell Cable

Ferrel Christensen

Ron Evans

James Haiden

Brian Hindmarch

Lynne Jenkinson

Abdulahi Mahamad

Alex Mahé

Dan Mason

Maureen Morrison

Denis Paquette

Terence Rowley

Matt Taylor

Conseil consultatif provincial de la condition féminine

Le lundi 25 mai 1998

Joyce Aylworth, membre

Joyce Hancock, présidente

« Lewis Day Barristers, Solicitors, Notaries »

David Day, c.r.

« Provincial Association Against Family Violence »

Helen Murphy, coordonnatrice

Kirsten Schmidt, membre

Elaine Wychreschuk, membre

À titre personnel

Donna Andrews

Robert McKim

Dave Omah-Maharajh

Eve Roberts

« Unified Family Court of St. John's »

Cathy Foster, conseillère du tribunal

Emily Friel, administratrice du tribunal

Sandra Hefford, conseillère du tribunal

Nancy Paul, conseillère du tribunal

Berkley Reynold, ancien administrateur du tribunal, lignes directrices relatives aux pensions alimentaires

White Ottenheimer

Gillian Butler, avocat et médiateur

Williams Roebothan

Glenda Best

« Annapolis Valley-Hants Community Action Program for Children »

Pauline Raven, coordonnatrice régionale

Deborah Reimer, aide et soutien

« Chrysalis House Association »

Mary De Wolf, RSW

Ginger McPhee

Conseil consultatif sur la condition féminine de la

Nouvelle-Écosse

Patricia Doyle-Bedwell, présidente

« Dalhousie Legal Aid Services »

Donna Franey, directrice

Elaine Gibson, avocate à la faculté

Claire McNeil, avocate

« Family Rights Association of Nova Scotia »

Elizabeth Bennett, bénévole, Droit de la famille

William O'Neil, directeur exécutif

« Islamic Society of North America »

Jamal Badawi, membre du Conseil Shura

« Mainland South Committee Against Women Abuse »

Marilynne Bell

Glenda Haydon, membre

« Nova Scotia Shared Parenting Association »

Rick Johnson, directeur

Le mardi 26 mai 1998

« Parents Without Custody »

Nancy Chipman, fondatrice

« Reierson Sealey, Barristers and Solicitors »

Julia Cornish, avocat, Droit de la famille

Angus Schurman, avocat, Droit de la famille

À titre personnel

Darcy Gray

Gene Keyes

Carlo Martini

Keith Mattinson

Sharon Molloy

Steven Nelson

Paul Parks

Brian Parsons

Alan Vokey

« Transition House Association »

Lyn Barrett, directrice exécutive de l'Association des maisons de transition du comté de Cumberland

Université Dalhousie

R. Thompson, professeur, Faculté de droit

« University College of Cape Breton Children's Rights

Centre »

Katherine Covell, directrice et professeur agrégée de psychologie

« Women's Centres CONNECT »

Bernadette MacDonald

Georgia MacNeil

Community Legal Information Association of Prince Edward Island »

Ann Sherman, directrice exécutive

« Macnutt and Dumont »

Daphne Dumont

« Mediation P.E.I. »

Frank Bulger, président

Diane Griffen

« P.E.I. Advisory Council on the Status of Women »

Mary Nicholson, membre

Sharon O'Brien, présidente

« P.E.J. Provincial Child Sexual Abuse Advisory

Committee »

Rona Brown, coprésidente

Elaine Rabinowitz, membre

« People Concepts »

Judy McCann-Beranger

Le mercredi 27 mai 1998

Associations et particuliers

À titre personnel

Bob Albert

Kathleen Loo Craig

David Dodds

Brian MacKay

Justin C. MacLellan

Kathleen MacLellan

Janet MacLeod

Lillian Mead

Sara Underwood

« Transition House Association »

Joanne Ings, directrice exécutive

« Barbara Gibson and Associates »

Barbara Gibson

Conseil consultatif sur la condition de la femme du

Nouveau-Brunswick

Lucy Riedle, présidente

« GRAND Society » section du Nouveau-Brunswick

Barbara Baird, conseillère juridique

Wally Haines, président

« Muriel McQueen Ferguson Centre for Family

Violence Research »

Rina Arsenault, directrice associée

Jennifer Robertson

« New Brunswick Shared Parenting Association »

Melynda Jarratt, membre

Dan Weston, membre

« Research and Advocacy Services »

Tasha Barnett

Vaughn Barnett

À titre personnel

Dennis Atchison

Bill Borland

Barbara Corbett

Alison Grenon

Lane MacIntosh

Giovanni Merlini

Terry Parks

Ken Paul

Brent Sherrard

Université du Nouveau-Brunswick

Jim Richardson, professeur, directeur, Département de sociologie

Le jeudi 28 mai 1998

Associations et particuliers

Date

Centre Jeunesse Outaouais

Le lundi 1^{er} juin 1998

Louise Carignan, travailleuse sociale, Protection de la jeunesse

Centre de service familial d'Ottawa-Carleton

Kay Marshall

Sandy Milne, coprésidente

Katherine Morrison, coprésidente

« Everyman Magazine »

David Shackleton, rédacteur en chef et éditeur

« Ex-Fathers »

Barry Aubin

Lloyd Gorling, fondateur

« Family Mediation Centre of Peterborough »

Patricia Houde, médiatrice

Drew McLay, médiateur

« FatherCraft Canada »

Glen Cheriton, rédacteur et recherchiste

« Freedom for Kids »

Nicholas Kovats

Société canadienne de pédiatrie

William Mahoney

À titre personnel

Brian Blak

Robert Bloom

Pierre Bougie

Allen Crawford

Joe Rade

Marc Wickham

Université Carleton

Walter DeKeseredy, professeur

Entraide pères-enfants séparés

Marc-André Pelletier, président

« Harmony House »

Leighann Burns-Campagna, directrice exécutive

« Men's Health Network »

Nedra Lander

Danielle Nahon

« National Alliance for the Advance of Non-Custodial

Parents »

Jason Bouchard

Le mercredi 3 juin 1998

À titre personnel

James Atwill

Joseph Ben-Ami

Adrian Blackburn

Michael Blackburn

Lynne Cohen Ben-Ami

Laurent Denys

Richard Fortin

Margery Gallinger

Gordon Green

Linda Henderson

George Lloyd

Lubomyr Luciuk

Nash Smith

Christian S. Tacit

Université de Sydney, Australie

Reg Graycar, professeur, Faculté de droit

« National Foundation for Family Research and

Education »

Adrienne Snow, coordonnatrice, Politique et communications

Statistique Canada

Yvan Clermont

Mike Sheridan

À titre personnel

Jim Gentle

Christopher Heeney

Leo Lehtiniemi

Louise Moreau

Université Queen

Ross Finnie, « School of Public Policy »

Assemblée des Premières nations

Art Dedam, directeur, Développement social

Wendall Nicholas, conseiller en capacité

Victor York, chef

Conseil national des femmes métisses

Alma Adams, présidente, Femmes métisses de l'Ontario

Sheila D. Genaille, présidente

Janice Henry, présidente, Femmes métisses de la Saskatchewan

« Native Women's Association of Canada »

Marilyn Buffalo, présidente

Le jeudi 4 juin 1998

Le lundi 8 juin 1998

Le mercredi 10 juin 1998

Associations et particuliers

Date

Pauktuutit (Association des femmes inuit)

Veronica Dewar, présidente

Mary Matoo, membre, Conseil régional de Kivalliq

Tracy O'Hearn, coordonnatrice, Projets spéciaux

Ralliement national Métis

Lance LaRose, directeur exécutif, « Métis Family and Community Justice Services Inc., Métis Nation of Saskatchewan »

Sonia Prevost-Derbecker, directrice exécutive intérimaire, « Institut Louis Riel, Manitoba Métis Federation »

À titre personnel

Ross Goodwin, juge

Thomas J. Gove, juge

Ken R. Halvorson, juge

Lynn King, juge

Mary Ellen Turpel-Lafond, juge

James Williams, juge

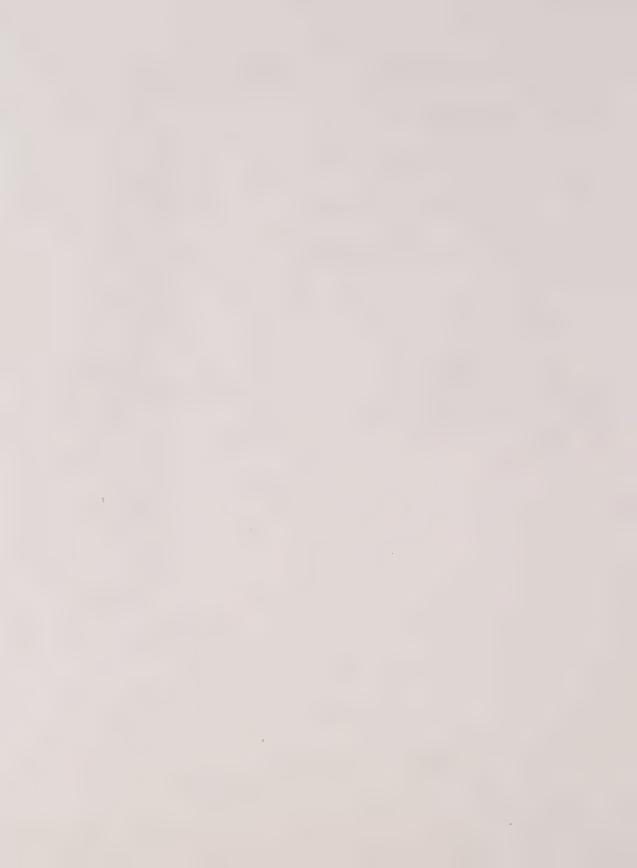
Secrétaire d'État (Enfance et Jeunesse)

L'hon, Ethel Blondin-Andrew

Secrétaire d'État (Multiculturalisme) (Situation de la femme)

L'hon. Hedy Fry

Le lundi 2 nobembre 1998



ANNEXE II

Mémoires présentés par des organismes

Ad Hoc Committee on Custody and Access Reform

Alberta Federation of Women United for Families

Assemblée des Premières Nations

Association du Barreau Canadien

Association canadienne de défense des droits des grands-parents (Ottawa)

Association lien pères enfants de Québec, inc.

Association masculine d'entraide pour la famille

Association nationale de la femme et du droit

Association of Separated and Divorced Women

Association to Reunite Grandparents and Families

Association des travailleuses et travailleurs sociaux de l'Ontario

B.C. Yukon Society of Transition Houses

Balance Beam

Barreau du Québec

Battered Women's Support Services

Boundary Women's Resource Centre

Bureau d'assistance à l'enfance et à la famille

Bureau d'enregistrement des enfants disparus de la GRC

C.H.A.N.C.E.S. Inc. Family Resource Centre

Calgary Ad Hod Committee on Children's Rights

Calgary Divorced Parents' Resources

Calgary Status of Women Action Committee

Canadian Association of Retired Persons

Canadian Grandparents Rights Association (Alberta)

Canadian Mothercraft of Ottawa-Carleton

Carbonear Legal Aid

CARe, the Children at Risk Committee

Central Toronto Youth Services, Research and Program Development

Child Find Alberta

Children's Advocate Office

Children's Rights Center

Children's Voice (The)

Chisholm, Gafni & Block

Coalition of Canadian Men's Organizations (CCMO)

Coalition canadienne pour les droits des enfants

Committee of the Legal Profession of the Province of Saskatchewan

Community Action Program for Children-Nova Scotia

Community Legal Information Association of Prince Edward Islamd

Community Network on Custody and Access of Durham Region

Conseil canadien des femmes du Canada

Conseil consultatif sur la condition de la femme du Nouveau-Brunswick

Conseil national des femmes métisses

DADS Canada

Dalhousie Legal Aid Services

Dick Freeman Society

Easton Alliance for the Prevention of Family Violence

ÉGALE (Égalité pour les gais et les lesbiennes)

Equal Parents of Canada

Equitable Child Maintenance & Access Society (Edmonton Chapter)

Equitable Child Maintenance and Access Society (Calgary Chapter)

Everyman Magazine

F.E.D.—U.P. (Fathers Equally Deserve Unrestricted Parenthood)

Fairness in Family Law

Families Against Deadbeats (F.A.D.)

Family Conflict Resolution Services

Family Rights Association of Nova Scotia

Family Services of Greater Vancouver

FatherCraft Canada

Fathers Are Capable Too (FACT)

Fathers For Equality

Fathers Rights Action Group

Fédération des associations de familles monoparentales et recomposées du Québec

FREDA

Freedom for Kids

G.R.A.N.D. Society (Manitoba Chapter) (Grandparents Requesting Access & Dignity)

G.R.A.N.D. Society (Ottawa Chapter) (Grandparents Requesting Access & Dignity)

Goldwater Dubé

Grandparents Raising Grandchildren Toronto (Canada)

Groupe d'action des pères pour le maintien des liens faniliaux (GAPMLF)

Guide du Canada

Guyatt & Gaasenbeek

Helping Unite Grandparents and Grandchildren

Heritage of Children Canada

Islamic Society of North America

La justice pour les enfants

Kamloops Women's Resource Centre

Kelowna Women's Resource Centre

Kids Need Both Parents

Report of the Special Joint Committee on Child Custody and Access

Ksan House Society Counselling Services

Ligue pour le bien-être de l'enfance du Canada

London Battered Women's Advocacy Centre

London Coordinating Committee to End Woman Abuse

London Status of Women Action Group

Low Impact Divorce Program Inc.

Macnutt & Dumont

Mainland South Committee Against Woman Abuse

Manitoba Family Services

Médiation familiale du Canada

Mediation PEI, Inc.

Merchant Law Group

Ministry of Women's Equality

Mississauga Children's Rights

Mom's House—Dad's House

Montreal Men Against Sexism

National Alliance for the Advancement of Non-Custodial Parents

New Brunswick Shared Parenting Association

New Directions

New Vocal Man Inc.

Niagra-on-the-Lake Chapter of Grandparents Raising Grandchildren

Non-Custodial Parents of Durham—NCPD

Nova Scotia Shared Parenting Association

Office of the Child, Youth & Family Advocate

Ontario Association of Interval and Transition Houses (OAITH)

Organisation pour la Sauvegarde des Droits des Enfants

Orphaned Grandparents Association

Parent & Carr. Barrister & Solicitors

Parents Helping Parents

Parents Without Custody

Pauline Jewitt Institute on Women's Studies

Peer Support Services for Abused Women

PEI Advisory Council on the Status of Women

Penticton and Area Women's Centre (PAWC)

Pères séparés inc.

Provincial Advisory Council on the Status of Women Newfoundland and Labrador

Provincial Association of Transition Houses Saskatchewan

Provincial Child Sexual Abuse Advisory Committee

R.E.A.L. Parents for Justice

Reierson Sealey, Barristers & Solicitors

Réseau Nemesis Network

Saskatchewan Action Committee Status of Women

Saskatchewan Battered Women's Advocacy Network

Société canadienne de pédiatrie

Services à la famille Canada

Services à la famille du Manitoba

Service de police régional d'Ottawa-Carleton

Service social international

Société de l'aide à l'enfance d'Ottawa-Carleton

Transition favorable de la famille

Transition House Association of Nova Scotia

Unified Family Court, St. Jean (Terre-Neuve)

Université de Carleton

Vancouver Coordinating Committee on Violence Against Women in Relationships

Vancouver Custody & Access Support and Advocacy Association (VCASAA)

Victoria Men's Centre

VRAIES Femmes du Canada

W. Glen Howe & Associates

Women's Centres CONNECT

Women In Action

Women's Resource Society

Yew Transition House

YWCA Children Who Witness Abuse Program of Greater Vancouver

YWCA Munroe House

YWCA of Canada

ANNEXE III

Mémoires présentés par des particuliers

Julie Black

A

C. Adams Wayne Addison Babatunde Agbi Mobarak Ali Wayne Allan Madeleine Allen Jenny Anderson Kristine Anderson Beverly Andrews Verne Andrusiek Leonard Andrychuk Doreen Arbuckle Jerry Arthur-Wong Dennis Atchison Barbara Atwill James Atwill Mary Atwill Erik L. Austin

R

Richard A. Babich Ronald D. Bailey Ross Alfred Bailey Nicholas Bala Paul C. Balint D. Barnes Vaughn Barnett Leslie Barter Debbie Beach Barbara Beaudette Lynanne Beck Karen M. Beekers Joseph Ben-Ami Moray Benoit John Bergen Emilia Betkova Larry Birbeck Jim Bishop

Bryan Black Michael Blackburn Charles Blair Brian J. Blak Robert J. Bloom Laurent Boileau Jacques Boucher Frank Boyd Susan B. Boyd Margaret Bradley Peter Bradley Mark Brodrick Hal Brown Carol Leonard Brownell Dennis Brunet Réjean Buissières Brent R. Burns Cliff Busche Margaret L. Busche

_

Jeanne Byron

Roy Buska Gillian Butler John Byers

Daniel Cabernel
Rusell and Elsie Cable
Ron Campbell
Paul Carrier
Glen Cartwright
Daniel I. Carroll
Darlene Ceci-Laws
George Charpentier
Dwayne Charpontier
Yat-Fan Chau
Gerald D. Chipeur
Yvonne Choquette
F. M. Christensen
Jenifer Christenson

Jack Christopher Salvatore Cino

E. Pauline Clark

Rob Cocroft

Lynne Cohen Ben-Ami

Christopher Cole

Judy Cole

Leyton Collins

H. Cook

Edward I. Corner

Gary Corriveau

Kheath Cote

Byrnece G. Cortens

Tony Costa

Dan Cox

Allen Crawford

Jim Croft

Duncan Croll

Robert Cross

Sean B. Cummings

D

Dann and Donna Dabels

Sheridan Dahlgren

Steve P. Daly

Peter Dauphinee

Ana David

Wayne D. Davidson

James Dawson

Martin Dawson

Nicole Deagan

David A. Decker

Margaret Decorte

Walter DeKeseredy

Barry Demeter

Anne Ross Demeter

Daniel DeMille

Wendy Dennis

Laurent Denys

Ebrahim Desai

Yvon Desilets

Tana Dineen

Blaine Dodds

David Dodd

Wayne W.P. Doney

Shirley Donnelly

Alex Doulis

Roxann Draper

Joel Duchoeny

Ernie Duffy

Dianne Duggan

E

G. Engstroem-Sariyan

Dorothy Emery

Ron Evans

F

Paul Fedynich

Paul Fenton

Gordon J. Ferguson

Barbara Jo Fidler

Dave Filan

Warren Fink

Doug Fitzgerald Jr.

John Fleurie

James L. Floyd

Frank and Marcella Folkmann

Peter Folkmann

Bill Forbes

Bryan Forbes

Mary Forbes

Anne Ford

Peggy Foy

Cynthia Fraser

Marius Frederick

Willard French

Wilfred Fromm

willred Fromini

Yvonne Froscer

Yvonne C. Frosch

Deryk Fullerton

G

François Gadoury

Stan E. Gal

Margery J. Gallinger

Glenn Galloway

Patricia Gartshore

Hilda Gee

Lionel Gendreau

Karen Gibbs

Barbara Gibson

Betty Gill

Rapport du Comité mixte spécial sur la garde et le droit de visiste des enfants -

Ian Gillespie

Gray Gillespie

Thelma Gillespie

George Godfrey

S. Goldenberg

Rosalind Golfman

Arthur Gorski

Ashok Goyal

Christopher Gratton-Mathiesen

Darcy Gray

Frank A. Greco

Doug Griffin

Kelly J. Grymaloski

Frank E. Gullich

Peter Gumplinger

Н

George Haeh

James Haiden

Bruce Haines

Gordon Haire

Terry Haire

K. Haka-Ikse

Avril Hanson

R. Harper

George Harvey

Kathleen Harvey

Robert Harvey

Jeff Hassim

Barbara Hawkins

Dawson G. Hay

Murray Hebblethwaite

Christopher Stephen Heeney

Albert Hein

David Hems

Laura Henderson

Dwayne Edward Hidson

Russell D. Hill

Brian Hindmarch

Robert Michael Hnatyshyn

J. Hofer

Lori Hogg

Joseph P. Hornick

Teresa Houle

Dave Hueglin

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Z

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PROCÈS VERBAL

LE MARDI 1^{er} DÉCEMBRE 1998 (séance n° 55)

[Traduction]

Le Comité mixte spécial sur la garde et le droit de visite des enfants se réunit aujourd'hui à huis clos, à 15 h 45, dans la salle 705 de l'édifice La Promenade, sous la présidence de Roger Gallaway et de l'honorable Landon Pearson, coprésidents.

Membres du Comité présents :

Du Sénat: Les honorables sénateurs Erminie J. Cohen, Joan Cook, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson.

De la Chambre des communes : Eleni Bakopanos, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Eric Lowther, Peter Mancini, Philip Mayfield, Caroline St-Hilaire et Diane St-Jacques.

Aussi présents : De la Bibliothèque du Parlement : Kristen Douglas, coordonnatrice de la recherche et Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Conformément à son ordre de renvoi du Sénat du 28 octobre 1997 et à celui de la Chambre des communes du 18 novembre 1997, le Comité reprend son étude de la garde et du droit de visite des enfants.

Le Comité reprend son examen d'une ébauche de rapport.

À 17 h 20, la séance est suspendue.

La séance reprend à huis clos le mercredi 2 décembre 1998, à 15 h 41, dans la salle 705 de l'immeuble La Promenade.

Les membres réunis sont :

Du Sénat: Les honorables sénateurs Erminie J. Cohen, Anne C. Cools, Mabel M. DeWare, Marian Maloney et Landon Pearson.

De la Chambre des communes : Eleni Bakopanos, Carolyn Bennett, Madeleine Dalphond-Guiral, Sheila Finestone, Paul Forseth, Roger Gallaway, Nancy Karetak-Lindell, Judi Longfield, Peter Mancini et Philip Mayfield.

Membre substitut présent : Pierrette Venne pour Caroline St-Hilaire.

Aussi présents : De la Bibliothèque du Parlement : Kristen Douglas, coordonnatrice de la recherche et Margaret Young, attachée de recherche; Ron Stewart, conseiller en recherche.

Le Comité reprend son examen d'une ébauche de rapport.

À 17 h 36, la séance est suspendue.

À 17 h 45, la séance reprend.

Sur motion du sénateur Erminie Cohen, *il est convenu*, — Que l'ébauche de rapport intitulée <u>Pour</u> <u>l'amour des enfants</u> soit adoptée en tant que rapport du Comité au Parlement.

Sur motion du sénateur Mabel DeWare, *il est convenu* — Que le Comité autorise l'impression d'opinions dissidentes du Parti réformiste, du Bloc québécois et du Nouveau Parti démocratique en annexe au rapport, à la suite de la signature des coprésidents.

Sur motion de Sheila Finestone, *il est convenu* — Que, conformément à l'article 109 du Règlement de la Chambre des communes, le Comité demande au gouvernement de déposer une réponse globale à ce rapport.

Sur motion de Judi Longfield, *il est convenu* — Que le Comité demande aux coprésidents de présenter le rapport du Comité tel qu'il a été adopté dans leur Chambre respective.

Sur motion de Nancy Karetak-Lindell, *il est convenu* — Que le Comité autorise l'impression de 5 000 exemplaires du rapport du Comité et, s'il reste des fonds dans le budget du Comité, que l'impression d'exemplaires additionnels soit autorisée.

Sur motion de Madeleine Dalphond-Guiral, *il est convenu* — Que le Comité autorise la destruction, un an après la date de présentation du rapport du Comité, de toutes les transcriptions de ses délibérations à huis clos.

À 18 h 35, le Comité s'ajourne jusqu'à nouvelle convocation de la présidence.

Les cogreffiers du Comité

CATHERINE PICCININ / RICHARD RUMAS

REMERCIEMENTS

Cette étude n'aurait pu être rendue possible sans l'aide et le dévouement d'un grand nombre de personnes.

Personnel du Comité

Cogreffiers:

Catherine Piccinin

Richard Rumas

Équipe de recherche:

De la Bibliothèque du Parlement, Service de recherche:

Kristen Douglas, coordonnatrice

Margaret Young

Expert-conseil:

Ron Stewart

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Korry Duckworth

Till Heyde

Justine Langham

Nathalie Labelle

Debbie Larocque-Pizzoferrato

Richard Ménard

Lise Tierney

Karen Titley

Révision/édition:

Angèline Fournier

Kathryn Randle

Le Comité a travaillé pendant de longues heures depuis plusieurs mois en faisant appel aux services d'un grand nombre d'agents de procédure, de recherche et d'administration, de rédacteurs, de journalistes, d'interprètes, de traducteurs, de messagers, ainsi que des personnels des publications, de la télédiffusion, des impressions, des services techniques et des services logistiques, qui ont rendu possible l'avancement des travaux et la production du rapport du Comité. Nous tenons à les remercier pour l'efficacité et le grand dévouement dont ils ont fait preuve.



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